(22,159)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 933.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. W. TUCKER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

	Original.	Print
Caption	1	1
Petition in error	2	1
Exhibit A—Case-made from district court of Osborne county, Kansas	5	2
Caption	5	2
Petition	8	3
Exhibit A—Bill of lading	11	5
B—Expense bill No. 612	15	9
Motion to require plaintiff to make his petition more definite and certain	16	9
Order on motion to make petition more definite and certain	19	11
Order granting time to amend petition	20	11
Order granting leave to withdraw answer	20	11
Amended petition	21	11
Demurrer to amended petition	25	13
Answer of M. P. Ry. Co. to amended petition	26	14
Reply to answer of M. P. Ry. Co.	29	15
Order sustaining demurrer	31	16
Order of dismissal as to A., T. & S. F. Ry. Co.	31	16

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 20, 1910.

SPOT ON PAGE

	Original.	Print
Exhibit A—*Continued.*		
Amended and supplemental answer of N. P. Ry. Co	33	17
Application for reference	35	18
Order granting change of venue	38	20
Transcript from district court of Mitchell county	40	21
Petition	40	21
Exhibit A—Bill of lading	43	22
B—Expense bill No. 612	47	26
Præcipe for summons	48	27
Summons	49	27
Sheriff's return	50	27
Præcipe for summons	51	28
Summons	52	28
Sheriff's return	53	29
Motion to make petition more certain	54	29
Answer of A., T. & S. F. Ry. Co.	55	30
Order to make petition more certain	56	30
Order granting time to amend	56	31
Order granting leave to withdraw answer	57	31
Amended petition	58	31
Demurrer of A., T. & S. F. Ry. Co to amended petition	62	33
Answer of M. P. Ry. Co. to amended petition	63	33
Reply	66	35
Order of dismissal as to A., T. & S. F. Ry. Co.	67	35
Motion to file amended and supplemental answer	69	36
Amended and supplemental answer	70	36
Application for reference	71	37
Order granting change of venue	73	38
Certificate of clerk of district court of Mitchell county to transcript from that court	74	39
Motion for judgment for defendant on the pleadings	75	39
Ruling on motion for judgment for defendant	76	39
Evidence for plaintiff	77	40
Testimony of J. W. Tucker	77	40
W. D. Marihugh	86	45
Plaintiff rests	86	45
Demurrer to evidence of plaintiff	87	46
Ruling on demurrer	88	46
Evidence for defendant	88	46
Testimony of A. De Bernardi	88	46
S. E. Sawyer	97	51
Exhibit C—Statement of total earnings and expenses, State of Kansas, six months ending December 31, 1907, of M. P. Ry. Co	101	54
D—Statement showing rate per ton per mile on oil provided for by joint freight tariff No. 8, 2586-A.	104	57

	Original.	Print
Exhibit A—*Continued.*		
Exhibit E—Statement of the total earnings and expenses, State of Kansas, six months ending December 31, 1907, of Central Branch Ry. Co.	105	58
Testimony of A. De Bernardi (recalled)	115	65
Defense rests	121	69
Evidence for plaintiff in rebuttal	122	69
Testimony of S. E Sawyer (recalled)	122	69
John B. Anslee	125	70
Exhibit F 1—Expense bill No. 775	127	72
F 2—Expense bill No. 1046	128	73
F 3—Expense bill No. 538	129	74
Evidence for defendant in surrebuttal	131	75
Testimony of K. M. Wharry	131	75
A. De Bernardi (recalled)	134	76
Both sides rest	135	76
Argument	135	77
Finding by the court	136	77
Motion for new trial	137	77
Order overruling motion for judgment for defendant on pleadings	140	78
Judgment	141	79
Order overruling motion for new trial	142	79
Order granting time to prepare case-made	142	79
Stenographer's certificate and receipt	143	79
Acknowledgment of service	143	80
Amendments suggested by plaintiff	144	80
Judge's certificate to case-made	145	80
Appearance for defendant in error	146	81
Order of submission	148	81
Judgment	150	82
Syllabus	152	82
Opinion	154	83
Clerk's certificate	161	87
Petition for writ of error	163	88
Order allowing writ of error	166	90
Order allowing writ of error and supersedeas, &c	168	90
Assignment of errors	170	91
Writ of error	173	92
Bond on writ of error	176	94
Acceptance of service of citation	177	95
Citation	178	95
Clerk's certificate as to writ-of-error papers	180	96
Clerk's return to writ of error	181	96

1 In the Supreme Court of the State of Kansas.

No. 16208.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
J. W. TUCKER, Defendant in Error.

Be it remembered, that on the 22nd day of October A. D. 1908, there was filed in the office of the clerk of the supreme court of the state of Kansas a petition in error and case made attached thereto, together with a waiver of summons in error and an entry of the appearance of the defendant in error, which petition in error and case made and waiver are in words and figures as follows, to-wit:—

2 In the Supreme Court of the State of Kansas.

No. 16208.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
J. W. TUCKER, Defendant in Error.

Petition in Error.

Filed Oct. 22, 1908. D. A. Valentine, Clerk Supreme Court.

The plaintiff in error above named respectfully represents and shows that the defendant in error above named was plaintiff in the district court of Osborne County, Kansas, in a certain suit therein pending against this plaintiff in error; that said defendant in error recovered a judgment against this plaintiff in error, by the consideration and judgment of said court, for the sum of $500.00 and costs. The original case-made, therein, containing copies of the records and proceedings, together with the evidence, signed, settled, and certified as by law required, is hereto attached, marked "Exhibit A," and made a part of this petition in error.

And the said plaintiff in error avers that there is error in said record, proceedings and case-made, in this,—that the said district court of Osborne County, Kansas, erred in each of the following matters, to-wit:

1st.

The Court erred in overruling the motion of the defendant in the court below for judgment on the pleadings. (Rec. pp. 68-69.)

2nd.

The Court erred in overruling the objection of the defendant in the court below to any evidence being received under the amended petition. (Rec. pp. 70-71.)

3rd.

The Court erred in overruling the demurrer of the defendant to plaintiff's evidence. (Rec. pp. 80-81.)

3 4th.

The court erred in finding against the defendant Railway Company, in favor of the plaintiff, (Rec. p. 129), and in rendering judgment against the said defendant.

5th.

The Court erred in overruling and denying the motion of the defendant in the court below for a new trial. (Rec. pp. 130-132.)

6th.

The court erred in refusing to hold and decide that the act of the legislature of the state of Kansas under which the said action was prosecuted was null and void,—being in conflict with the Fourteenth Amendment to the Constitution of the United States, or in conflict with the Constitution of the state of Kansas.

Wherefore the said plaintiff in error asks that the said judgment may be reversed and set aside, and held for naught, and that said plaintiff in error be restored to all things it has lost by reason thereof; and that this court enter such judgment as the court below should have entered upon the record.

B. P. WAGGENER,
Attorneys for Plaintiff in Error.

Filed Oct. 22, 1908. D. A. Valenitne, Clerk Supreme Court.

4 Filed October 22, 1908. D. A. Valentine, Clerk Supreme Court.

5 EXHIBIT "A".

No. 16208.

Original Case-Made.

No. 3146.

In the Case of

J. W. TUCKER, Plaintiff,
v.
THE MISSOURI PACIFIC RAILWAY Co., a Corporation, and the Atchison, Topeka and Santa Fe Railway Co., a Corporation, Defendants.

Filed Oct. 22, 1908. D. A. Valentine, Clerk Supreme Court.

Heretofore pending in the District Court of Osborne County, Kansas.

SPOTS ON P

Hon. R. M. Pickler, Judge.
R. H. Towne, Attorney for the Plaintiff.
C. H. Nicholas and B. P. Waggener, Attorneys for the Defendants.
George D. Pickler, Official Reporter.

6 Filed Oct. 22, 1908. D. A. Valentine, Clerk Supreme Court.

7 In the District Court of Osborne County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY CO., a Corporation, and the Atchison, Topeka & Santa Fe Railway Co., a Corporation, Defendants.

Case-Made.

Be it remembered, that hereafter, to-wit, on the 13th day of August, 1907, the Plaintiff, J. W. Tucker, commenced this action against the said Defendants, The Missouri Pacific Railway Company, a corporation, and the Atchison, Topeka & Santa Fe Railway Company, a Corporation, by filing in the office of the Clerk of the District Court of Mitchell County, Kansas, his petition, which is in words and figures as follows:

8 In the District Court of Mitchell County, Kansas.

No. 3164.

J. W. TUCKER, Plaintiff,
v.
THE MISSOURI PACIFIC RAILWAY CO., a Corporation, and the Atchison, Topeka & Santa Fe Railway Co., a Corporation, Defendants.

Petition.

The above named Plaintiff for his cause of action states and alleges:

That the above named Defendants at all times hereinafter stated and mentioned were and still are Railroad Corporations duly organized, chartered and existing in accordance with the laws of the State of Kansas, and doing business as such corporations under and by virtue of the laws of said state, and that said Defendants were and still are operating its railroads with rolling stock, cars and engines situated thereon, under said corporate capacity and under and by virtue of the laws of said state, and that said first named Defendants railroad with rolling stock passed through the County of Mitchell

and State of Kansas, known as the Missouri Pacific Railway Company.

9 That on or about the 14th day of December, 1906, the Webster Refining Co. shipped to said Plaintiff over the railroad lines of said Defendants, twenty-five (25) barrels of a certain product of crude petroleum commonly known as fuel oil, also known as refined distillate oil, all contained in twenty five (25) certain barrels, and delivered the same to said Defendants to be transported by them as such common carriers, from Humboldt in the County of Allen to Cawker City in the County of Mitchell, both in the State of Kansas, as per bill-of-lading attached hereto, marked "Exhibit A" and made a part hereof as fully and completely as if herein rewritten. Such transportation and shipment being wholly within said State, the distance between said point of shipment and destination respectively along the line of shipment and transportation of railroads of said Defendants being not more than three hundred (300) miles, for which transportation and shipment of said oil in the barrels aforesaid, said Defendants were entitled to charge, exact and receive under the statute of said State in such case made and provided, not to exceed the sum of eleven and five-tenths (11 5/10) cents for each one hundred pounds of said oil so shipped and transported, including the weight of said barrels in which the same were so transported, such shipment being known as a double line shipment, the total weight of said barrels and said contents thereon having been then and there 10,432 lbs., which at the rate so fixed by the statute in such case made and provided, amounted in the aggregate to the sum of Twelve ($12.) Dollars.

That on or about the 27th day of December, 1906, this Plaintiff received from the said Defendant, the Missouri Pacific Railway Company at its established station in the City of Cawker City,

10 Mitchell County, Kansas, the said 25 barrels and contents of refined distillate oil through its said regular station, and the general and regular agent, C. H. Pugh acting on the part of said Defendant, demanded, exacted and received of and from the the said Plaintiff for the said transportation and shipment of the said 25 barrels and the contents thereof of refined distillate oil, the freight charges of Fifteen and 2/100 ($15.02) dollars, being in excess of the charge that said Defendants were entitled to receive and against the will of the above named Plaintiff, all as per Ex. bill #612, marked "Exhibit B", attached hereto and made a part hereof as fully and completely as if herein rewritten; said charge of $15.02 which was demanded, exacted and received on the part of said Defendants from this Plaintiff at said time being in excess of the lawful rates for the transportation of said 25 barrels and contents of refined distillate oil from Humboldt, Kansas, to Cawker City, Kansas, to the injury of this Plaintiff, and said excess charges of $15.02 was and is in violation of said laws fixing the maximum rate for transportation of crude oil and the products thereof under Chap. 355 of the Session Laws of 1905 of the State of Kansas; said excess charges that were exacted, demanded and received from the said Plaintiff by the said Defendants being under said law to the

injury and damage to this Plaintiff in the sum of Five Hundred ($500.00) Dollars liquidated damages and in the further sum to be fixed by the Court as a reasonable Attorney's fee for the conducting of this action and for the recovery of said damages so as aforesaid received.

11 Wherefore, the Plaintiff prays for judgment against the Defendants, the Missouri Pacific Railway Co., a Corporation and the Atchison, Topeka and Santa Fe Railway Co., a Corporation in the sum of Five Hundred ($500.) Dollars together with his reasonable Attorney's fees to be fixed by the Court, the costs of this action and for other and further relief as to this Court may seem just and equitable.

J. W. TUCKER AND
GEO. E. TUCKER,
Attorneys for Plaintiff.

"EXHIBIT A."

(Form 1. Regular.)

The Atchison, Topeka & Santa Fe Railway Company.

Bill of Lading.—Duplicate.

No. —. HUMBOLDT, KANS., *Dec.* 14, 1906.

Received from Webster Refining Co. the following described, packages, in apparent good order (Contents and value unknown), consigned and marked and numbered in the margin, to be transported upon the conditions expressed herein and on the back hereof, over the line of this road to —— station, and delivered in like good order to the consignee or owner at said station, if upon the line of this road, or to some connecting carrier, if said station is upon a connecting line and beyond the line of this road, whose line may be considered a part of the route to the place of destination of said freight, it being distinctly understood that the responsibility of each carrier shall not begin until it receives the freight from the consignor or from a connecting carrier and shall cease when it delivers the same to a connecting carrier or the consignee.

12 Property to be delivered at a station where there is no regular railroad station agent, or at private or other sidings shall be considered delivered to and at risk of owners when and as soon as left on platform or on side track, in car. The Atchison, Topeka & Santa Fe Railway Company, guarantees, upon the conditions expressed herein and on the back hereof, that the rate for transportation from the place of shipment to —— shall not exceed the rate noted on this Bill of lading and charges advanced by them, provided that the contents of said packages are properly represented in specific and not in general terms upon the receipt (original and duplicate), and further provided that the property below described is not diverted en route from the line or lines of carriers to which it may be consigned by the Atchison, Topeka & Santa Fe Railway

Company, at the instance or through the agency of the shippers or consignees, either or both of them, without the consent of the Atchison, Topeka & Santa Fe Railway Company. This contract is made also for the separate benefit of each connecting carrier and upon and is subject to the conditions as printed on the back hereof.

Subject to Minimum Charge.

Marks and consignee.	No. pkgs.	Description of articles as given by consignor, subject to correction.	Weights as given by the consignor, subject to correction.
J. W. Tucker & Co., Cawker City, Kansas. Via Mo. Pac. from Concordia.	.....	25 bbls. Refined Distillate Oil.	10432

Declared value.....

Via.....

Advanced charges.....

From.....

To.....

In cents per One Hundred pounds.

13

No shipment, however shall, rated less than 100 pounds.

IN WITNESS WHEREOF, the agent has affirmed to one original Bill of Lading and — copies, all of this tenor and date, the copies not being transferable.

In consideration of the rate of freight herein named, and the guaranty thereof contained herein and in the conditions on the back hereof, it is hereby stipulated that the service to be performed hereunder shall be subject to said conditions, whether printed or written and said conditions are hereby agreed to by the shipper and by him accepted, for himself and his assigns as just and reasonable.

In accepting this bill of lading the shipper, owner and consignee of the goods and the holder of the Bill of Lading agree to be bound by all the stipulations, exceptions and conditions whether written or printed on the face or back hereof, as fully as if they were all signed by such shipper, owner, consignee or holder.

WEBSTER REFINING CO., *Shipper*,
GEO. McKINLEY, *Agent*.

Conditions.

The carrier will not receive on any train Gold or Silver Coin, Bullion or Manufactured Articles of Gold and Silver, Jewells and Watches, Painting- or Pictures, Statuettes, Bank Bills, Drafts, Notes, Bonds Stock Deeds, Contracts, Mail Matter, Valuable Papers or other Writings, and no Agent or Conductor is authorized to take charge of the same; and if shipper secretly or with other property,

unknown to the Officers and Agents of the carrier, the carrier will not be responsible in case of loss or damage from any cause whatever.

When the contents of packages are not properly represented by the shipper, it is agreed that upon the actual contents of the packages the published rate of the several carriers over whose lines the goods must pass to destination is the only rate guaranteed.

When the words "Owner's Risk" or the letters "O. R." are noted on this bill of Lading, the shipper assumes the risk of all loss or damage to the property in the course of transportation, and in any event not to exceed the declared value hereon stated, if any.

When this bill of lading bears a notation showing that the valuation of the freight is released to any amount, it is agreed that the value of the freight does not exceed such amount, it is agreed that any carrier which may be liable for loss or damage of the freight shall not be bound to pay more than such amount.

When the words "Loaded by Shipper" or "Shipper's Count" are noted on this Bill or Lading, it is an acknowledgement on the part of the shipper that the carrier is not liable directly or indirectly for loss or damage arising from improper stowage or insufficient *packages,* or for any discrepancy in count or quantity.

No carrier shall be responsible for loss or damage of any of the freight shipped, unless it is proved to have occurred during the time of its transit over the particular carriers' line, and of this notice must be given within thirty hours after the arrival of the same at destination.

No carrier shall be responsible for loss or damage to property unless notice in writing of such loss or damage is given to the delivering carrier within thirty hours after delivery.

No carrier shall be responsible for the loss of packages the contents of which are unknown, for the leakage of any kind of liquids, breakage of any kind of Glass, carboys of Acid or articles packed in glass, stoves or stove furniture, castings, Machinery, Carriages, Furniture, Musical Instruments or any kind, Packages of Eggs, or for rust of iron and Iron Articles, or for the condition of
14 baling of or loss or damage on Hay, Hemp, Cotton, or any other article whose bulk renders it necessary to transport on open cars, or for damage to perishable property of any kind occasioned by delays from any cause or change of weather, nor for any loss of weight of Grain, or Coffee in bags, or Rice in tierces, nor for loss of Nuts in bags, or Lemons or Oranges in boxes not covered by canvas, or for loss or damage to freight occasioned by providential causes by fires or negligence, or for loss of Flour or any other property caused by bad or insufficient cooperage, or for loss or damage on the lakes or rivers. It is further agreed that for all loss or damage occurring in transit of freight, the legal remedy shall be against only the particular carrier in whose custody the said freight may actually be at the time of the happening thereof. In the event of the loss of any property for which any carrier may be responsible under this Bill of Lading, the value or cost of the same at the point and time of shipment is to govern the settlement,

unless the valuation is otherwise released or stated on this Bill of Lading.

Any carrier liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property.

All packages subject to charge for cooperage if necessary.

No carrier shall be responsible for loss or damage to FLAT COTTON by fire from any cause, whatever, while in transit or at stations.

No carrier shall be responsible for accidents or delays from causes which could not be reasonable anticipated or avoided.

No carrier shall be responsible for delay, loss or damage caused by or on account of strikes, riots or mobs.

All freight shall be subject to transfer en route, as the necessities or convenience of any carrier requires.

The owner or consignee shall pay charges as per specified rates upon the goods as they arrive.

In consideration of the reduced rates herein given on goods packed in bales it is agreed that each carrier over whose line the said goods shall pass in course of transportation is released by the shipper of said goods for all claims for damage by chafing in transit.

Freight must be removed from the station during business hours on the day of its arrival at destination, or shall be stored at the owner's sole risk and expense.

All carload freight shall be subject to a minimum charge for trackage and rental of $1.00 per car for each twenty-four hours' detention or fractional part thereof after the expiration of twenty-four hours from its arrival at destination, and the carrier shall have the same lien and to the same extent upon the property for such charge as for transportation charges.

This Bill of Lading must be presented without alteration or erasure.

The original Bill of Lading only is transferable.

Copies are furnished for the information of those concerned, but are otherwise valueless, except as evidence that a Bill of Lading has been issued.

Agents have no authority to issue more than one original bill of Lading, and only for or to cover goods actually received for transportation.

Each and every covenant, provision and exemption in this Bill of Lading shall apply to and inure separately in favor of each and every connecting carrier which may transport said packages or goods to destination as fully and to the same extent as the same applies to and inures in favor of the initial carrier issuing this Bill of Lading, as though each such connecting carrier were specifically named herein in the place and stead of such initial carrier.

15 Shippers will take notice that when goods are consigned "To Order", the Name and Address of some party or parties to whom notice of arrival at destination may be sent must be given or the goods *or the goods* will be subject to carriage or warehouse charges.

"EXHIBIT B."

Form 1194. Rev.

Ex. Bill No. 612.

Claims for Overcharge, Loss or Damage must Invariably be accompanied by Original Bills of Lading and Expense Bills. Attach to them bill against Company, giving particulars.

Cawker Station, — Division, 12–27, 1906.

M. J. W. Tucker,

To The Missouri Pacific Railway Company, Dr.

E. B. No. [C.]*	For transportation and charges on—	Weight.	Rate.	Freight charges.	Advance charges.
Where from, Concordia. Consignor, Humboldt. Way Bill No. 717	25 Brl. Ref. Oil (8R)	10432	7	7.30	7.72
					15.02

Received Payment.

C. H. PUGH, *Agent.*

Charges payable on delivery. Goods to be removed within twenty-four hours after arrival.

On the back of said Petition, omitting the title of said cause, appears the following endorsement:

"Filed August 31st, 1907. John Hall, Clerk District Court."

16 That thereafter, and on the 10th day of September, 1907, the Defendant, the Missouri Pacific Railway Company, filed its motion to require the Plaintiff to make his Petition more definite and certain, which motion is in words and figures as follows:

In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, and the Atchison, Topeka and Santa Fe Railway Company, a Corporation, Defendants.

Motion to Require the Plaintiff to Make His Petition More Definite and Certain.

Now comes the Defendant, the Missouri Pacific Railway Company and asks the Court to require the Plaintiff to make his Petition more definite and certain in the following particulars to-wit:

[* Word enclosed in brackets erased in copy.]

First.

In that part of said petition wherein it is alleged that "The distance between said point of shipment and destination respectively along the line of shipment and transportation on the railroads of said Defendant being not more than three — (300) miles," etc.

that the said Plaintiff be required to state specifically the number of miles that said shipment was transported over
17 each of said Defendant's lines of road and to state the route that said shipment was transported over the line of the Defendant, the Atchison Topeka and Santa Fe Railway Company's line.

B. P. WAGGENER,
W. P. WAGGENER,
G. W. DASHIELL,
Attorneys for Defendant, the Missouri Pacific Railway Company.

On the back of said motion, omitting the title of said cause, appears the following endorsement:
"Filed September 10th, 1907. John Hall, Clerk, Dist. Court."

18 On this 23 day of September, 1907, it being one of the days of the regular 1907 term of the District Court of Mitchell County, Kansas, the said motion to make the Petition more definite and certain was called up for hearing and the Plaintiff appeared in person and the Defendants appeared by F. T. Burnham and Park B. Pulsifer their Attorneys and after argument of said motion, and after consideration the Court sustained said motion, and the Plaintiff was required to set out the distance which the shipment alleged in said Petition to have been made was carried by the Atchison Topeka & Santa Fe Railway Company, and the distance that the said shipment was carried by the Missouri Pacific Railroad Company, to which order of the Court, the Plaintiff excepted and thereupon on request of Plaintiff he was given to and including October 23" 1907 in which to prepare and file amended Petition and Defendants and each of them were given to and including the 20th day of November, 1907, to plead to such amended Petition so to be filed, and thereupon the Atchison Topeka and Santa Fe Railway Company asked leave of Court to withdraw the answer heretofore filed, which leave of Court is granted and said Answer was withdrawn to which the Plaintiff excepted, a Journal Entry of such proceedings being in words and figures as follows:

19 In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,

v.

THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, and The Atchison, Topeka and Santa Fe Railway Company, a Corporation, Defendants.

Journal Entry.

On this September 23rd, 1907, a regular day of the September 1907 term of the District Court of Mitchell County, Kansas, comes the Plaintiff in person, and also come the Defendants by F. T. Burnham and Park B. Pulsifer, Attorneys:

And thereupon the Defendant, The Missouri Pacific Railway Company presents its motion for an order requiring the plaintiff to make his petition more definite and certain. And the Court having considered said motion doth allow the same in this:

That the Plaintiff be required to set out the distance which the shipment, alleged in said petition to have been made, was carried by the Atchison, Topeka & Santa Fe Railway Company, and the distance that the said shipment was carried by the Missouri Pacific Railway Company, to which order of Court the Plaintiff excepted.

20 And thereupon on request of Plaintiff he is given to and including October 23d in which to prepare and file amended petition; and Defendants, and each of them, are given to and including November 20th, 1907, to plead to such amended petition so to be filed.

And thereupon in open Court, the Defendant, The Atchison, Topeka and Santa Fe Railway Company asks leave of Court to withdraw its answer heretofore filed herein, and which leave of Court is granted and said answer is withdrawn; to which the Plaintiff excepted.

R. M. PICKLER, *Judge.*

On the back of said Journal Entry, omitting the title of said cause, appears the following endorsement:

"Filed September 25th, 1907. John Hall, Clerk District Court."

21 That thereafter, and on the 22nd day of October, 1907, the Plaintiff filed in the District Court of Mitchell County, Kansas, his Amended Petition, which appears in words and figures as follows:

J. W. TUCKER, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, and The Atchison, Topeka & Santa Fe Railway Company, a Corporation, Defendants.

Amended Petition.

The above named Plaintiff for his cause of action states and alleged: That the above named Defendants at all times hereinafter

stated and mentioned, were, and still are Railroad Corporations duly organized, chartered and existing in accordance with the laws of the State of Kansas, and doing business as such Corporations under and by virtue of the laws of said State, and that said Defendants were and still are operating its railroads with rolling stock, cars and engines situated thereon, under said corporate capacity and under and by virtue of the laws of said State, and that said first named Defendant's railroad with rolling stock passed through the County of Mitchell and State of Kansas, known as the Missouri Pacific Railway Co.

22 That on or about the 14th day of December, 1906, the Webster Refining Co. shipped to said Plaintiff over the railroad lines of said defendants twenty-five (25) barrels of a certain product of crude petroleum commonly known as fuel oil, also known as refined distillate oil, all caontained in 25 certain barrels, and delivered the same to said Defendant- to be transported by them as such common carriers, from Humboldt, in the County of Allen, to Cawker City in the county of Mitchell, both in the State of Kansas. Such transportation and shipment being wholly within said State, the distance between said point- of shipment and destination respectively along the line of shipment and transportation on the railroads of said defendants being three hundred (300) miles. Such transportation and shipment being two hundred fifty-three (253) miles over the line of railroad of the Defendant, the Atchison, Topeka and Santa Fe Railway Co. from Humboldt, the place of shipment, to Concordia, Kansas, and a distance of forty-seven (47) miles over the line of railroad of the Defendant, the Missouri Pacific Railway Co. from Concordia to Cawker City, the place of destination of said shipment for which transportation and shipment of said oil in the barrels aforesaid, said Defendants were entitled to charge, exact and receive under the Statute of said State in such case made and provided, the sum of eleven and five-tenths (11 5/10) cents for each one hundred pounds of said oil so shipped and transported, including the weight of said barrels in which the same were so transported, such shipment being known as a double line shipment, the total weight of said barrels and said contents therein having been then and there, 10,432 lbs., which, at the rate so fixed by the

23 statute in such case made and provided, amounted in the aggregate to the sum of Twelve ($12.00) Dollars.

That on or about the 27th day of December, 1906, this Plaintiff received from the said Defendant, The Missouri Pacific Railway Co. at its established station in the City of Cawker City, Mitchell County, Kansas, the said 25 barrels and contents of refined distillate fuel oil through its said regular station, and the general and regular agent, C. H. Pugh, acting on the part of said Defendant, demanded, exacted and received of and from the said Plaintiff for the said transportation and shipment of the said 25 barrels and the contents thereof of refined distillate fuel oil, the freight charges of Fifteen and 2/100 ($15.02) Dollars, being in excess of the charge that said Defendants were entitled to receive and against the will of the above named Plaintiff. Said charge of ($15.02) which was demanded, exacted

and received on the part of said defendants from this Plaintiff at said time being in excess of the lawful rates for the transportation of said 25 barrels and contents of refined distillate fuel oil from Humboldt, Kansas, to Cawker City, Kansas, to the injury of this Plaintiff, and said excess charge of $15.02 was and is in violation of said laws fixing the maximum rate for transportation of crude oil and the products thereof under Chap. 353 of the Session Laws of 1905 of the State of Kansas, said excess charges that were exacted, demanded and received from the said Plaintiff by the said Defendants being under said law to the injury and damage to this Plaintiff in the sum of Five Hundred ($500) Dollars liquidated damages and in a further sum to be fixed by the Court as a reasonable attorney's fee for the conducting of this action and for the
24 recovery of said damages so as aforesaid received.

Wherefore, The Plaintiff prays for judgment against the defendants, the Missouri Pacific Railway Co., a Corporation, and The Atchison, Topeka & Santa Fe Railway Co., a Corporation, in the sum of Five Hundred ($500.00) Dollars together with his reasonable attorney's fee to be fixed by the Court, the costs of this action and for such other and further relief as to this Court may seem just and equitable.

GEO. E. TUCKER AND
J. W. TUCKER,
Attorneys for Plaintiff.

On the back of said Amended Petition, omitting the title of said cause, appears the following endorsement:
"Filed October 22nd, 1907. John Hall, Clerk District Court."

25 That thereafter, and on the 6th day of November, 1907, the Defendant, The Atchison, Topeka and Santa Fe Railway Company, filed its separate demurrer to the Amended Petition of the Plaintiff, which demurrer appears in words and figures as follows:

In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY and THE ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, Defendants.

Demurrer by the Atchison, Topeka and Santa Fe Railway Company.

And now comes the Defendant, The Atchison, Topeka and Santa Fe Railway Company, and demurs to the amended petition on file herein, for the reason that the same does not state, or tend to state, any cause of action in favor of the Plaintiff and against this Defendant.

WM. R. SMITH,
PULSIFER & HUNT,
Attorneys for the Defendant The Atchison, Topeka & Santa Fe Railway Company.

On the back of said Demurrer, omitting the title of said cause, appears the following endorsement:

"Filed November 6th, 1907. John Hall, Clerk District Court."

That thereafter, and on the 15th day of November, 1907, the Defendant, The Missouri Pacific Railway Company, filed its separate answer to the Amended Petition of the Plaintiff, which Separate Answer is in words and figures as follows:

26

In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, and the Atchison, Topeka & Santa Fe Railway Company, a Corporation, Defendants.

Separate Answer of the Missouri Pacific Railway Company to Amended Petition.

Now comes the above named Defendant, the Missouri Pacific Railway Company, and, for its answer to the Amended Petition filed herein, says:

First.

That it admits that it is a corporation, duly chartered, incorporated and existing under the laws of the State of Missouri, and engaged in the operation of a line of railway through the States of Missouri, Kansas, Nebraska and Colorado; and that it is an interstate railway, and subject to the control of the act of Congress to regulate commerce and the Interstate Commerce Commission, passed in pursuance thereof.

Second.

For further answer, this Defendant says that chapter 353 of the Laws of Kansas, 1905, being an act entitled: "An Act to es-
27 tablish maximum rates for the transportation of crude oil and the products thereof, to forbid rebates, and provide penalties for the violation thereof"; approved February 17th, 1905,—is unconstitutional and void, in this: that it is an attempt to deprive the said Defendant Company of the use of its property without due process of law, and to apply the same for public use without just compensation, and is in violation of the Fourteenth Amendment to the Constitution of the United States. That the rates fixed by said act of the legislature for the transportation of crude oil, and the products thereof, are unreasonable, in this: that they do not furnish sufficient compensation for the service to be performed by the said Defendant, and other common carriers. That said act of the legislature under which said Plaintiff pretends to bring and prosecute this action was enacted by the legislature of Kansas without any

consideration of the question whether the rates therein prescribed were reasonable and just, or compensatory or otherwise.

Third.

This defendant further says that said act of the Legislature is in violation of the constitutional laws of Kansas, in this: that it attempts to deprive the said Defendant of its property without just compensation, by the pretended establishment of lower rates than are reasonable and just for the service required to be performed; that the charges made by said Defendant to the said Plaintiff for the service performed by it were reasonable and just, and were not in violation of any constitutional or lawful act of the Legislature of the State of Kansas, or any act of Congress passed in pursuance of the power of Congress to regulate commerce between the states.

28 Fourth.

For further answer, Defendant denies each and every allegation, statement and averment in said Amended Petition contained.

Wherefore this Defendant prays judgment for costs.

B. P. WAGGENER,
BURNHAM & DASHIELL,
W. P. WAGGENER,
Attorneys for Defendant.

On the back of said Separate Answer, omitting the title of said cause, appears the following endorsement:
"Filed November 15th, 1907. John Hall, Clerk District Court."

29 That thereafter, and on the 13th day of January, 1908, the Plaintiff filed his reply to the Separate Answer of the Missouri Pacific Railway Company, which said reply appears in words and figures as follows:

In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, and THE Atchison, Topeka and Santa Fe Railway Company, a Corporation, Defendants.

Reply to the Separate Answer of the Missouri Pacific Railway Company, a Corporation.

The Plaintiff, for reply to the separate answer of the Defendant, the Missouri Pacific Railway Company, a Corporation, denies each and every allegation, statement and averment of new matter contained in said separate answer.

Wherefore, the Plaintiff prays for judgment against the Defendant, the Missouri Pacific Railway Company, a corporation, in the

sum of Five Hundred Dollars ($500.00) together with his reasonable attorney's fees to be fixed by the Court, the costs of this action, and for such other and further relief as to this Court may seem just and equitable.

J. W. TUCKER AND
R. H. TOWNE,
Attorneys for Plaintiff.

On the back of said reply, omitting the title of said cause, appears the following endorsement:
"Filed January 13th, 1908. John Hall, Clerk."

30 That thereafter, and on January 13th, it being one of the days of the regular January 1907 term of the District Court of Mitchell County, Kansas, the above entitled case came on to be heard on the demurrer filed by the Atchison, Topeka and Santa Fe Railway Company to the Amended Petition filed on the part of the Plaintiff, the Plaintiff appeared in person and by his attorney, R. H. Towne, and the Defendant, The Atchison, Topeka and Santa Fe Railway Company appeared by Park B. Pulsifer, its Attorney, and the Court having heard argument of Counsel and considered said demurrer, sustained the same and thereupon the Plaintiff in open court, asked leave of the Court to dismiss said action as to the Defendant, The Atchison, Topeka and Santa Fe Railway Company, which leave was granted by the Court, and said action was dismissed as to the Atchison, Topeka and Santa Fe Railway Company, and judgment was rendered against the Plaintiff for the costs of this proceeding as between him and the Defendant, The Atchison, Topeka and Santa Fe Railway Company. The Journal Entry of such action, orders and judgment, being in words and figures as follows:

31 In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, and THE Atchison, Topeka and Santa Fe Railway Company, a Corporation, Defendants.

Journal Entry.

And now on this January 13th, 1908, a regular day of the January term, 1908, of the District Court of Mitchell County, Kansas, the above-entitled matter came on to be heard on the demurrer filed by the Atchison, Topeka and Santa Fe Railway Company to the Amended Petition filed on the part of Plaintiff, the Plaintiff appearing in person and by his attorney, R. H. Towne, and the Defendant, Atchison, Topeka & Santa Fe Railway Company appearing by Park B. Pulsifer, its Attorney.

And the Court having heard the argument of Counsel, and considered said demurer, doth sustain the same.

And thereupon the Plaintiff, in open court, asks leave of Court, to dismiss said action as to the Defendant, Atchison, Topeka & Santa Fe Railway Company, which leave is by the Court granted, and said action is dismised as to the Defendant Atchison, Topeka and Santa Fe Railway Company.

32 It is further ordered by the Court, that the Plaintiff pay the costs of this proceeding as between him and the Defendant, The Atchison, Topeka & Santa Fe Railway Company.

R. M. PICKLER, *Judge.*

O. K.

J. W. TUCKER,
For Plaintiff.
P. B. PULSIFER,
Attorney for Defendant The Atchison, Topeka & Santa Fe Railway Company.

On the back of said Journal Entry, omitting the title of said cause, appears the following endorsement:

"Filed January 16th, 1908. John Hall, Clerk of the District Court."

33 That thereafter, and on the 13th day of February, 1908, leave of Court, having first been obtained, the Defendant, the Missouri Pacific Railway Company, filed *their* Amended and Supplemental Answer, which appears in words and figures as follows:

In the District Court of Mitchell County, State of Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Amended and Supplemental Answer.

Now comes the Defendant, the Missouri Pacific Railway Company, and, for its Amended and Supplemental Answer herein, says:

First.

That since filing of the original answer herein the said Defendant has ascertained that the excess charge collected by Defendant's Agent was the result of a mistake on the part of said Agent, and was not the result of any intention on the part of said Agent or said Defendant to violate said law, although Defendant claims that said law is unconstitutional and void, as alleged in the original answer filed herein; and said Defendant now here offers to confess judgment for the full amount of said alleged excess, to-wit: $3.12, with interest thereon from December 27th, 1906, and for costs of

suit, and here brings into court the said sum aforesaid, and
34 tenders it to the said Plaintiff.

BURNHAM, DASHIELL &
MICHAELSON,
W. P. WAGGENER,
B. P. WAGGENER,
Attorneys for Defendant Mo. Pacific Railway Company.

On the back of said amended and Supplemental Answer, omitting the title of said cause, appears the following endorsement:
"Filed February 13th, 1908. John Hall, Clerk District Court."

35 That thereafter, and on the 20th day of April, 1908, the Defendant, the Missouri Pacific Railway Company filed its Application for a Reference of this action, which appears in words and figures as follows:

In the District Court of Mitchell County, State of Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Application for Reference.

Now comes the above named Defendant, the Missouri Pacific Railway Company, and represents to the Court that the chief issue to be tried herein is whether or not the maximum oil rates, as established by chapter 353, Laws of Kansas 1905, in an act entitled: "An act to establish maximum rates for the transportation of crude oil, and the products thereof, to forbid rebates, and provide penalties for the violation hereof",—deprives the Defendant Company of the use of its property without due process of law; and whether or not the rates fixed by said act of the Legislature are unreasonable and unjust,—whether the same are compensatory or not.

That to properly determine such questions, it will be necessary to examine all of the books of the Defendant Company
36 showing the receipts and disbursements of said Company, and will involve an examination of many thousand pages of book accounts and innumerable disbursement vouchers. Defendant further says that the taking of an account from said books and vouchers will be necessary in order to inform the Court before judgment can be properly rendered herein.

Wherefore the Defendant, the Missouri Pacific Railway Company, asks that the Court appoint some suitable person to make an examination of said books, book accounts, and disbursement vouchers, and to report to this Court the result of such investigation.

F. T. BURNHAM,
W. P. WAGGENER,
B. P. WAGGENER,
Attorneys for Defendant.

STATE OF KANSAS,
Atchison County, ss:

W. P. Waggener, being first duly sworn, upon oath, deposes and says that he is one of the duly authorized attorneys for the Defendant, the Missouri Pacific Railway Company, and is well acquainted with the issues in the above entitled cause, as made by the pleadings therein,—and he further states that all the matters stated in the foregoing application are true.

W. P. WAGGENER.

Subscribed and sworn to before me this 18th day of April, 1908.

NETTIE RAY CLUTE,
[SEAL.] *Notary Public.*

My Commission expires Feb. 3d, 1909.

"Filed April 20th, 1908. John Hall, Clerk District Court."

37 That thereafter, and on the 20th day of April, 1908, it being one of the regular days of the April 1908 term of the District Court of Mitchell County, Kansas, the above case came up for hearing on the application of the Defendant for reference of the questions involved in said action, and the Plaintiff appeared in person and by R. H. Towne, his Attorney, and the Defendant, Missouri Pacific Railway Company, appeared by W. P. Waggener its Attorney, and said motion was presented and argued to the Court by the Counsel for the Plaintiff, and Counsel for the Defendant, The Missouri Pacific Railway Company, and after consideration, the Court overruled said application, the Defendant, The Missouri Pacific Railway Company, then and there excepting to such ruling of the court.

That thereafter, and on the same day, that is, the 20th day of April, 1908, the Plaintiff being present in open Court, and by his attorney R. H. Towne, and the Defendant, The Missouri Pacific Railway Company, by its attorney, W. P. Waggener, the parties mutually agreed that this cause should be transferred on change of venue to the District Court, in and for Osborne County, the costs of said change of venue, and all of the costs in this action up to and including the 20th day of April, 1908, to be borne by the Defendant, The Missouri Pacific Railway Company, and the Defendant in open Court waived all questions of jurisdiction consequent upon said change of venue, said cause to stand for trial at the May, 1908 term of said District Court of Osborne County, Kansas, a Journal Entry of such agreement, order and proceedings being in words and figures as follows:

38 In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Journal Entry.

And now, to-wit: on this 20th day of April, A. D. 1908, it being one of the regular days of the April Term, 1908, of the District Court, in and for Mitchell County, Kansas, R. M. Pickler, Judge presiding, the Plaintiff being present in Court in person and by his Attorney, and the defendant being present by its Attorneys; Upon agreement of the parties in open court, it is ordered and the court hereby doth order, that change of venue be and it hereby is granted in this cause to the District Court in and for Osborne County, the costs of said change of venue and all of the costs in this cause to date, to be borne by said Defendants, The Missouri Pacific Railway Company, and said Defendant in open court waives all questions of jurisdiction consequent upon said change of venue, said cause to stand for trial at the May term, A. D. 1908, of said District Court of Osborne County.

It is further ordered that the Clerk of this Court prepare transcript of the record in this cause for said change of venue at the request of either party; and transmit the same to the Clerk of the District Court of Osborne County, the costs thereof to be paid
39 by said Defendant, The Missouri Pacific Railway Company.

R. M. PICKLER,
Judge of Said Court.

O. K.

R. H. TOWNE,
For Plaintiff.
B. P. WAGGENER,
Att'y for Defendant.

On the back of said Journal Entry, omitting the title of said cause, appears the following endorsement:
"Filed May 12th, 1908. John Hall, Clerk District Court."

40 That thereafter, and on May 13th, 1908, there was filed in the office of the Clerk of the District Court of Osborne County, a transcript of the record in the above entitled case, as found and occurring in the District Court of Mitchell County, Kansas, which said transcript appears in words and figures as follows:

In the District Court of Mitchell County, Kansas.

Case No. 3164.

J. W. TUCKER, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, and THE Topeka, Atchison and Santa Fe Railway Company, a Corporation, Defendants.

Petition.

The above named Plaintiff for his cause of action states and alleges:

That the above named Defendants at all times hereinafter stated and mentioned were and still are Railroad corporations duly organized, chartered and existing in accordance with the laws of the State of Kansas, and doing business as such corporations under and by virtue of the laws of said state, and that said Defendants were and still are operating its railroads with rolling stock, cars and engines situated thereon, under said corporate capacity and under and by virtue of the laws of said State, and that said first named Defendant's railroad with rolling stock passed through the County of Mitchell and State of Kansas, known as the Missouri Pacific Railway Company.

41 That on or about the 14th day of December, 1906, The Webster Refining Company shipped to said Plaintiff over the railroad lines of said Defendants twenty-five (25) barrels of a certain product of crude petroleum commonly known as fuel oil, also known as refined distillate oil, all contained in 25 barrels and delivered the same to said Defendants to be transported by them as such common carriers, from Humboldt, in the County of Allen to Cawker City in the County of Mitchell, both in the State of Kansas, as per bill-of-lading attached hereto, marked "Exhibit A" and made a part hereof as fully and completely as if herein re-written. Such transportation and shipment being wholly within said state, the distance between said point of shipment and destination respectively along the line of shipment and transportation on the railroads of said defendants being not more than three hundred (300) miles, for which transportation and shipment of said oil in the barrels aforesaid, said Defendants were entitled to charge, exact and receive under the statute of said state in such case made and provided, not to exceed the sum of eleven and five-tenths (11 5/10) cents for each one hundred pounds of said oil so shipped and transported including the weight of said barrels in which the same was so transported, such shipment being known as a "Double line Shipment" the total weight of said barrels and said contents thereon having been then and there 10,432 lbs., which, at the rate so fixed by the statute in such case made and provided, amounted in the aggregate to the sum of Twelve ($12) Dollars.

42 That on or about the 27th day of December, 1906, this Plaintiff received from the said Defendant, The Missouri Pacific Railway Company at its established station in the City of Cawker City, Mitchell County, Kansas, the said 25 barrels and contents of refined distillate oil through its said regular station, and the general and regular agent, C. H. Pugh, acting on the part of said Defendant, demanded, exacted and received of and from the said Plaintiff for the said transportation and shipment of the said 25 barrels and the contents thereof of refined distillate oil, the freight charges of Fifteen and 2/100 ($15.02) Dollars, being in excess of the charge that said defendants were entitled to receive and against the will of the above named Plaintiff, all as per Ex. bill #612, marked "Exhibit B", attached hereto and made a part hereof as fully and completely as if herein rewritten; said charge of $15.02 which was demanded, exacted and received on the part of said Defendants from this Plaintiff at said time being in excess of the lawful rates for the transportation of said 25 barrels and contents of refined distillate oil from Humboldt, Kansas to Cawker City, Kansas to the injury of this Plaintiff, and said excess charge of $15.02 was and is in violation of said laws fixing the maximum rate for transportation of crude oil and the products thereof under Chap. 353 of the Sessions Laws of 1905 of the State of Kansas; said excess charges that were exacted, demanded and received from the said Plaintiff by the said Defendants being under said law to the injury and damage to this Plaintiff in the sum of Five Hundred ($500.00) Dollars liquidated damages and in a further sum to be fixed by the court as a reasonable attorney's fee for the conducting of this action and for the recovery of said damages so as aforesaid received.

43 Wherefore, the Plaintiff prays for judgment against the Defendants, The Missouri Pacific Railway Company a corporation, and The Atchison, Topeka and Santa Fe Railway Company, a Corporation in the sum of Five Hundred ($500.00) Dollars together with his reasonable attorney's fees to be fixed by the Court, the costs of this action and for other and further relief as to this Court may seem just and equitable.

J. W. TUCKER AND
GEO. E. TUCKER,
Attorneys for Plaintiff.

"EXHIBIT A."

(Form 1. Regular.)

The Atchison, Topeka and Santa Fe Railway Company.

Bill of Lading—Duplicate.

No. —. HUMBOLDT, KANS., *Dec. 14th,* 1906.

Received from Webster Refining Company, the following described packages, in apparent good order (contents and value unknown), consigned and marked and numbered in the margin, to

be transported upon the conditions expressed herein and on the back hereof, over the line of this road to —— station, and delivered in like good order to the consignee or owner at said station, if upon the line of this road, or to some connecting carrier, if said station is upon a connecting line and beyond the line of this road, whose line may be considered, a part of the route to the place of destination of said freight, it being distinctly understood that the responsibility of each carrier shall not begin until it received the freight from the consignor or from a connecting carrier, and shall cease when it delivers the same to a connecting carrier or to the consignee. Property to be delivered at a station where there is no regular railroad station agent, or at private or other sidings, shall be considered delivered to and at risk of owner when and as soon as left on platform or on side track, in car. The Atchison, Topeka and Santa Fe Railway Company, guarantees upon the conditions expressed herein and on the back hereof, that the rate for transportation from the place of shipment to —— shall not exceed the rate noted on this Bill of lading and charges advanced by them, provided that the contents of said packages are properly represented in specific and not in general terms upon the receipt (original and duplicate), and further provided that the property below
44 described is not diverted en route from the line or lines of carriers to which it may be consigned by the Atchison, Topeka & Santa Fe Railway Company, at the instance or through the Agency of the shippers or consignees, either or both of them, without the consent of the Atchison, Topeka & Santa Fe Railway Company. This contract is made also for the separate benefit of each connecting carrier and upon and is subject to the conditions as printed on the back hereof.

Subject to Minimum Charge.

Marks and consignee.	No. pkgs.	Description of articles as given by consignor, subject to correction.	Weights as given by consignor, subject to correction.
J. W. Tucker & Co., Cawker City, Kans. Via Mo. Pac. from Concordia.	.....	25 barrels Refined distillate oil.	10432

Declared value.....

Via.....

Advanced Charges....

From.....

To.....

In Witness Whereof, the agent has affirmed to one original Bill of Lading and — copies, all of this tenor and date, the copies not being transferable.

In consideration of the rate of freight herein named, and the guaranty thereof contained herein and in the conditions on the back hereof, it is hereby stipulated that the service to be performed hereunder shall be subject to said conditions, whether print-

In cents per one hundred Pounds.

ed or written, and said conditions are hereby agreed to by the shipper and by him accepted, for himself and his assigns as just and reasonable.

In accepting this Bill of Lading the shipper, owner and consignee of the goods and the holder of the Bill of Lading agree to be bound by all the stipulations, exceptions and conditions whether written or printed on the fact of back hereof, as fully as if they were all signed by such shipper, owner, consignee or holder.

No shipment, however small, rated less than 100 pounds.

WEBSTER REFINING CO., *Shipper.*
GEO. McKINLEY, *Agent.*

45 *Conditions.*

The carrier will not receive on any train Gold or Silver Coin, Bullion or Manufactured Articles of Gold and Silver, Jewels and Watches, Painting or Pictures, Statuettes, Bank Bills, Drafts, Notes, Bonds, Stock Deeds, Contracts, Mail Matter, Valuable Papers or other writings, and no Agent or Conductor is authorized to take charge of the same; and if shipper secretly or with other property, unknown to the Officers and Agents of the carrier, the carrier will not be responsible in case of loss or damage from any cause whatever.

When the contents of packages are not properly represented by the shipper, it is agreed that upon the actual contents of the packages the published rate of the several carriers over whose lines the goods must pass to destination is the only rate guaranteed.

When the words "Owner's Risk" or the letters "O. R." are noted on this Bill of Lading, the shipper assumes the risk of all loss or damage to the property in the course of transportation, and in any event not to exceed the declared value hereon stated, if any.

When this Bill of Lading bears a notation showing that the valuation of the freight is released to any amount, it is agreed that the value of the freight does not exceed such amount and that any carrier which may be liable for loss or damage of the freight shall not be bound to pay more than such amount.

When the words "Loaded by Shipper" or "Shipper's Count" are noted on this Bill of Lading, it is an acknowledgement on the part of the shipper that the carrier is not liable directly or indirectly for loss or damage arising from improper stowage or insufficient *packages*, or for any discrepancy in count or quantity.

No carrier shall be responsible for loss or damage of any of the freight shipped unless it is proved to have occurred during the time of its transit over the particular carrier's line, and of this notice must be given within thirty hours after the arrival of the same at destination.

No carrier shall be responsible for the loss of packages the contents of which are unknown, for the leakage of any kind of Liquids, breakage of any kind of Glass, Carboys, of Acid or articles packed

in glass, Stoves or Stove Furniture, Castings, Machinery, Carriages, Furniture, Musical Instruments of any kind, Packages of Eggs, or for rust of iron and Iron Articles, or for the condition of baling of or loss or damage on Hay, Hemp, Cotton, or any other article whose bulk renders it necessary for transport on open cars, or for damage to perishable property of any kind occasioned by delays from any cause or change of weather, nor for any loss of weight of grain, or Coffee in bags, or Rice in tierces nor for loss of Nuts in bags, or Lemons or Oranges in boxes not covered by canvas, or for loss or damage to freight occasioned by providential causes by fires or negligence, or cooperage, or for loss or damage on the lakes or rivers. It is further agreed that for all loss or damage occurring in transit of freight, the legal remedy shall be against only the particular carrier in whose custody the said freight may actually be at the time of the happening thereof. In the event of the loss of any property for which any carrier may be responsible under this Bill of Lading, the value or cost of the same at the point and time of shipment, is to govern the settlement, unless the valuation is otherwise released or stated on this Bill of Lading.

46 Any carrier liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property.

All packages subject to charge for cooperage if necessary. No carrier shall be responsible for loss or damage to FLAT COTTON by fire from any cause, whatever while in transit or at Stations.

No carrier shall be responsible for accidents or delays from causes which could not be reasonable anticipated or avoided.

No carrier shall be responsible for delay, loss or damage caused by or on account of strikes, riots or mobs.

All freight shall be subject to transfer en route, as the necessities or convenience of any carrier requires.

The owner or consignee shall pay charges as per specified rates upon the goods as they arrive.

In consideration of the reduced rates herein given on goods packed in bales it is agreed that each carrier over whose line the said goods shall pass in course of transportation is released by the shipper of said goods *for* all claims for damage by chafing in transit.

Freight must be removed from the station during business hours on the day of its arrival at destination, or shall be stored at the owner's sole risk and expense.

All carload freight shall be subject to a minimum charge for trackage and rental of $1.00 per car for each twenty-four hours' detention or fractional part thereof after the expiration of twenty-four hours from its arrival at destination, and the carrier shall have the same lien and to the same extent upon the property for such charge as for transportation charges. This bill of Lading must be presented without alteration or erasure.

The original bill of Lading only is transferable.

Copies are furnished for the information of those concerned, but are otherwise valueless, except as evidence that a Bill of Lading has been issued.

Agents have no authority to issue more than one original Bill of Lading, and only for or to cover goods actually received for transportation.

Each and every covenant, provision and exemption in this Bill of Lading shall apply to and inure separately in favor of each and every connecting carrier which may transport said packages or goods to destination as fully and to the same extent as the same applies to and inures in favor of the initial carrier issuing this bill of lading, as though each such connecting carrier were specifically named herein in the place and stead of such initial carrier.

Shippers will take notice that when goods are consigned "To Order," the Name and Address of some party or parties to whom notice of arrival at destination may be sent must be given, or the goods will be subject to carriage or warehouse charges.

47 "EXHIBIT B."

Form 1149. Rev.

Ex. Bill No. 612.

Claims for Overcharge, Loss or Damage must Invariably be accompanied by Original Bills of Lading and Expense Bills.
Attach to them bill against Company, giving particulars.

Cawker Station, Division 12/27/1906.

M J. W. Tucker.

To The Missouri Pacific Railway Company, Dr.

E. B. No.	For transportation and charges on—	Weight.	Rate.	Freight charges.	Advance charges.
Where from, Concordia. Consignor, Humboldt. Way Bill No. 717	25 Brl. Ref. Oil. (8R)	10432	7	7.30	7.72
					15.02

Received Payment.

C. H. PUGH, *Agent.*

Charges payable on delivery. Goods to be removed within twenty-four hours after arrival.

On the back of said Petition, omitting the title of said cause, appears the following endorsement:

"Filed August 13", 1907. John Hall, Clerk Dist. Court."

48 *Præcipe for Summons.*

STATE OF KANSAS,
Mitchell County, ss:

In the District Court for said County.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, and THE Atchison, Topeka and Santa Fe Railway Company, a Corporation, Defendants.

The Clerk of said Court will issue a summons in the above entitled action against defendants The Missouri Pacific Railway Company, a Corporation.

Direct to the Sheriff of the County of Mitchell and State of Kansas, and returnable according to law.

J. W. TUCKER,
Attorney for ——.

"Filed August 13", 1907. John Hall, Clerk."

49 *Summons.*

STATE OF KANSAS,
Mitchell County, ss:

Fifteenth Judicial District.

The State of Kansas to the Sheriff of Mitchell County, Greeting:

You are hereby commanded to notify the Missouri Pacific Railway Company, a Corporation that it has been sued together with The Atchison, Topeka & Santa Fe Railway Company, a Corporation, by J. W. Tucker, in the District Court, Fifteenth Judicial District, State of Kansas, sitting within and for the County of Mitchell, and that it must answer the petition filed against it in the clerk's office of the said Court on or before the 11th day of September, A. D. 1907, or such petition will be taken as true and judgment rendered accordingly.

You will make the return of this summons on or before the 22 day of August, A. D. 1907.

Witness my hand and seal of said Court, at my office in the City of Beloit, in the said County of Mitchell, this 13th day of August, A. D. 1907.

[SEAL.] JOHN HALL, *Clerk.*

50 STATE OF KANSAS,
Mitchell County, ss:

Received this writ August 13th, 1907, and as commanded therein I summoned the following persons, of the Defendant within named, at the time following, to-wit:

The Missouri Pacific Railway Company, a corporation, August 17, 1907, by delivering to J. W. Werts, Station Agent, at the City of Beloit, Mitchell Co. of said Missouri Pacific Railway Co., a true certified copy of the within summons with all the endorsements thereon.

J. D. VAN HOOK, *Sheriff.*

"Filed August 17", 1907. John Hall, Clerk."

51 *Præcipe for Summons.*

STATE OF KANSAS,
Mitchell County, ss:

In the District Court of said County.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, and THE Topeka, Atchison and Santa Fe Railway Company, a Corporation, Defendants.

Præcipe for Summons.

The Clerk of said Court will issue a summons in the above entitled action against Defendants, The Atchison, Topeka & Santa Fe Railway Co., a Corporation.

Direct to the Sheriff of the County of Cloud and State of Kansas and returnable according to law.

J. W. TUCKER,
Attorney for ——.

"Filed August 13", 1907. John Hall, Clerk."

52 *Summons.*

STATE OF KANSAS,
Mitchell County, ss:

Fifteenth Judicial District.

The State of Kansas to the Sheriff of Cloud County, Greeting:

You are hereby commanded to notify The Atchison, Topeka & Santa Fe Railway Company, a Corporation that it has been sued together with the Missouri Pacific Railway Company, a Corporation by J. W. Tucker, in the District Court, Fifteenth Judicial District, State of Kansas, sitting within and for the County of Mitchell, and that it must answer the petitions filed against it in the clerk's office of the said Court on or before the 12th day of September A. D. 1907, or such petition will be taken as true and judgment rendered accordingly.

You will make the return of this summons on or before the 23d day of August, A. D. 1907.

Witness my hand and the seal of said Court, at my office in the City of Beloit, in the said County of Mitchell this 13th day of August, A. D. 1907.

[SEAL.] JOHN HALL, *Clerk.*

53 STATE OF KANSAS,
Cloud County, ss:

Received this writ August 14th, 1907, and as commanded therein, I summoned the following persons, of the Defendants within named, at the time following, to-wit: August 14th, 1907—The Atchison, Topeka & Santa Fe Railway Company, a Corporation, by delivering a true and certified copy of the within summons to J. H. Sheeley, Station Agent and Ticket Agent for said Company at Concordia, Cloud County, Kansas, The President, Vice President or other officers of said Company not being found in my county.

RUFUS GRAY, *Sheriff.*

"Filed August 15th, 1907. John Hall, Clerk."

54 In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, and The Atchison, Topeka & Santa Fe Railway Company, a Corporation, Defendants.

Motion to Require the Plaintiff to Make His Petition More Definite and Certain.

Now comes the Defendant, The Missouri Pacific Railway Company, and asks the Court to require the Plaintiff to make his petition more definite and certain in the following particulars to-wit:

First.

In that part of said petition wherein it is alleged that

"The distance between said point of shipment and destination respectively along the line of shipment and transportation on the railroads of said defendant- being not more than three hundred (300) miles", etc.

that the said Plaintiff be required to state specifically the number of miles that said shipment was transported over each of said Defendants' lines of road and to state the route that said shipment was

transported over the line of the Defendant, The Atchison, Topeka and Santa Fe Railway Company's line.

W. P. WAGGENER,
B. P. WAGGENER,
G. W. DASHIELL,
Attorneys for Defendant The Missouri Pacific Railway Company.

"Filed September 10" 1907. John Hall, Clerk."

55 In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, and The Atchison, Topeka and Santa Fe Railway Company, a Corporation, Defendants.

Answer.

Comes now The Atchison, Topeka and Santa Fe Railway Company, one of the Defendants in the above-entitled action, and for answer to the Plaintiff's petition filed therein, denies each and every material allegation in said petition contained.

Wherefore, said Defendant prays to be hence dismissed with its costs.

WM. SMITH,
PARK B. PULSIFER,
Attorneys for Defendant The Atchison, Topeka and Santa Fe Railway Company.

"Filed September 11th, 1907. John Hall, Clerk."

56 In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendants.

Journal Entry.

On this September 23d, 1907, a regular day of the September 1907 term of the District Court of Mitchell County, Kansas, comes the Plaintiff in person, and also come the Defendants by F. T. Burnham and Park B. Pulsifer, Attorneys:

And thereupon the Defendant, The Missouri Pacific Railway Company presents its motion for an order requiring the Plaintiff to make his petition more definite and certain. And the Court having considered said motion doth allow the same in this:

That the Plaintiff be required to set out the distance which the shipment, alleged in said petition to have been made, was carried by the Atchison, Topeka & Santa Fe Railway Company, and the distance that the said shipment was carried by the Missouri Pacific Railway Company; to which order of Court the Plaintiff excepted.

And thereupon on request of Plaintiff he is given to and including October 23d, in which to prepare and file amended petition; and Defendants, and each of them, are given to and including Nov. 20th, 1907, to plead such amended petition so to be filed.

57 And thereupon in open Court, the Defendant, The Atchison, Topeka and Santa Fe Railway Company asks leave of Court to withdraw its answer heretofore filed herein, which leave of Court is granted and said answer is withdrawn; to which the Plaintiff excepted.

R. M. PICKLER, *Judge.*

O. K.

——— ———,
For Plaintiff.

——— ———,
For Defendants.

"Filed September —, 1907. John Hall, Clerk Dist. Court."

58 In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY CO., a Corporation, and the Atchison, Topeka & Santa Fe Railway Co., a Corporation, Defendants.

Amended Petition.

The above named Plaintiff for his cause of action states and alleges: That the above named Defendants at all times hereinafter stated and mentioned, were, and still are Railroad Corporations duly organized, chartered and existing in accordance with the laws of the State of Kansas, and doing business as such corporations under and by virtue of the laws of said State, and that said Defendants were and still are operating its railroads with rolling stock, cars and engines situated thereon, under said corporate capacity and under and by virtue of the laws of said State, and that said first named Defendant's railroad with rolling stock passed through the County of Mitchell and State of Kansas, known as the Missouri Pacific Railway Company.

That on or about the 14th day of December, 1906, The Webster Refining Company shipped to said Plaintiff over the railroad lines of said defendants twenty-five (25) barrels of a certain product of crude petroleum commonly known as fuel oil, also known
59 as refined distillate Oil, all contained in 25 certain barrels, and delivered the same to said Defendants to be transported

by them as such common carriers, from Humboldt, in the County of Allen, to Cawker City in the County of Mitchell, both in the State of Kansas. Such transportation and shipment being wholly within said State, the distance between said point- of shipment and destination respectively along the line of shipment and transportation on the railroads of said defendants being three hundred (300) miles. Such transportation and shipment being two hundred fifty-three (253) miles over the line of railroad of the Defendant, The Atchison, Topeka and Santa Fe Railway Company from Humboldt, the place of shipment to Concordia, Kansas, and a distance of forty-seven (47) miles over the line of railroad of the Defendant, The Missouri Pacific Railway Company from Concordia to Cawker City, the place of destination of said shipment, for which transportation and shipment of said oil in the barrels aforesaid, said Defendants were entitled to charge, exact and receive under the Statute of said State in such case made and provided, the sum of eleven and five-tenths (11 5/10), cents for each one hundred pounds of said oil so shipped and transported, including the weight of said barrels in which the same was so transported, such shipment being known as a double line shipment, the total weight of said barrels and said contents therein having been then and there 10,432 lbs., which, at the rate so fixed by the Statute in such case made and provided, amounted in the aggregate to the sum of Twelve ($12.00) Dollars.

That on or about the 27th day of December, 1906, this Plaintiff received from the said Defendant, The Missouri Pacific Rail-
60 way Company at its established station in the City of Cawker City, Mitchell County, Kansas, the said 25 barrels and contents of refined distillate fuel oil through its said regular station and the general and regular agent, C. H. Pugh, acting on the part of said Defendant, demanded, exacted and received of and from the said Plaintiff for the said transportation and shipment of the said 25 barrels and the contents thereof of refined distillate fuel Oil, the freight charges of Fifteen and 2/100 ($15.02) Dollars, being in excess of the charge that said Defendants were entitled to receive and against the will of the above named Plaintiff. Said charge of $15.02 which was demanded, exacted and received on the part of said defendants from this Plaintiff at said time being in excess of the lawful rates for the transportation of said 25 barrels and contents of refined distillate fuel oil from Humboldt, Kansas to Cawker City, Kansas, to the injury of this Plaintiff, and said excess charge of $15.02 was and is in violation of said laws fixing the maximum rate for transportation of crude oil and the products thereof under Chap. 353 of the Session Laws of 1905 of the State of Kansas; said excess charges that *th*ere exacted, demanded and received from the said Plaintiff by the said defendants being under said law to the injury and damage of this Plaintiff in the sum of Five Hundred (500.00) Dollars liquidated damages and in a further sum to be fixed by the Court as a reasonable attorney's fee for the conducting of this action and for the recovery of said damages so as aforesaid received.

61 Wherefore, The Plaintiff prays for judgment against the defendants, The Missouri Pacific Railway Company, a Cor-

poration, and The Atchison, Topeka and Santa Fe Railway Company, a Corporation in the sum of Five Hundred ($500.00) Dollars together with his reasonable attorney's fee to be fixed by the Court, the costs of this action and for such other and further relief as to this Court may seem just and equitable.

GEO E. TUCKER AND
J. W. TUCKER,
Attorneys for Plaintiff.

"Filed October, 22nd, 1907. John Hall, Clerk of the District Court."

62 In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY and THE ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, Defendants.

Demurrer by the Atchison, Topeka and Santa Fe Railway Co.

And now comes the Defendant, The Atchison, Topeka and Santa Fe Railway Company, and demurs to the amended petition on file herein, for the reason that the same does not state, or tend to state, any cause of action in favor of the Plaintiff and against this Defendant.

WM. R. SMITH,
PULSIFER & HUNT,
Attorneys for the Defendant The Atchison, Topeka & Santa Fe Railway Company.

"Filed November 6th, 1907. John Hall, Clerk District Court."

63 In the District Court of Mitchell County, State of Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, and the Atchison, Topeka and Santa Fe Railway Company, a Corporation, Defendants.

Separate Answer of the Missouri Pacific Railway Company to Amended Petition.

Now comes the above named Defendant, The Missouri Pacific Railway Company, and, for its answer to the amended petition filed herein, says:

First.

That it admits that it is a corporation, duly chartered, incorporated and existing under the laws of the State of Missouri, and engaged in the operation of a line of railway through the States of Missouri,

Kansas, Nebraska and Colorado; and that it is an interstate railway, and subject to the control of the Act of Congress to regulate commerce and the Interstate Commerce Commission, passed in pursuance thereof.

Second.

For further answer, this Defendant says that chapter 353 of the Laws of Kansas, 1905,—being an act entitled: "An Act to establish maximum rates for the transportation of crude oil and the products thereof, to forbid rebates, and provide penalties for the viola-
64 tion thereof"; approved February 17th, 1905,—is unconstitutional and void, in this: that it is an attempt to deprive the said Defendant company of the use of its property without due process of law, and to apply the same for public use without just compensation, and is in violation of the Fourteenth Amendment to the Constitution of the United States. That the rates fixed by said act of the Legislature for the transportation of crude oil, and the products thereof, are unreasonable, in this; that they do not furnish sufficient compensation for the service to be performed by the said Defendant and other common carriers. That said act of the Legislature under which said Plaintiff pretends to bring and prosecute this action was enacted by the Legislature of Kansas without any consideration of the question whether the rates therein prescribed were reasonable and just, or compensatory or otherwise.

Third.

This Defendant further says that said act of the Legislature is in violation of the constitutional laws of Kansas, in this: that it attempts to deprive the said defendant of its property without just compensation, by the pretended establishment of lower rates than are reasonable and just for the service required to be performed; that the charges made by said defendant to the said Plaintiff for the service performed by it were reasonable and just, and were not in violation of any constitutional or lawful act of the legislature of the State of Kansas, or any act of Congress passed in pursuance of the power of Congress to regulate commerce between the states.

65 Fourth.

For further answer, Defendant denies each and every allegation statement, and averment in said amended petition contained.

Wherefore, this Defendant prays judgment for costs.

B. P. WAGGENER,
BURNHAM & DASHIELL,
W. P. WAGGENER,
Attorneys for Defendant.

"Filed November 15th, 1907. John Hall, Clerk of the District Court."

66 In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFC RAILWAY COMPANY, a Corporation, and THE Atchison, Topeka and Santa Fe Railway Company, a Corporation, Defendants.

Reply to the Separate Answer of the Missouri Pacific Railway, a Corporation.

The plaintiff, for reply to the separate answer of the Defendants, The Missouri Pacific Railway Company, a corporation, denies each and every allegation, statement and averment of new matter contained in said separate answer.

Wherefore, the Plaintiff prays for judgment against the Defendant, The Missouri Pacific Railway, a corporation in the sum of Five Hundred Dollars ($500.00) together with his reasonable attorney's fees to be fixed by the Court, the costs of this action, and for such other and further relief as to this Court may seem just and equitable.

J. W. TUCKER &
R. H. TOWNE,
Attorneys for Plaintiff.

"Filed January 13th, 1908. John Hall, Clerk District Court."

67 In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY, Defendants.

Journal Entry.

And now on this January 13th, 1908, a regular day of the January, term 1908, of the District Court of Mitchell County, Kansas, the above-entitled matter came on to be heard on the demurrer filed by the Atchison, Topeka & Santa Fe Railway Company to the amended petition filed on the part of Plaintiff, the Plaintiff appearing in person and by his Attorney, H. Towne, and the Defendant, Atchison, Topeka & Santa Fe Railway Company appearing by Park B. Pulsifer, its attorney.

And the Court having heard the argument of Counsel, and considered said demurrer, doth sustain the same.

And thereupon the Plaintiff, in open court, asks leave of Court to dismiss said action as to the Defendant Atchison, Topeka and Santa Fe Railway Company, which leave is by the Court granted, and said action is dismissed as to the Defendant Atchison, Topeka and Santa Fe Railway Company.

It is further ordered by the Court that the plaintiff pay the costs of this proceeding as between him and the Defendant, The
68 Atchison, Topeka and Santa Fe Railway Company.

R. M. PICKLER, *Judge.*

O. K.

J. W. TUCKER,
For Plaintiff.
PARK B. PULSIFER,
Attorney for Defendant, Atchison, Topeka and Santa Fe Railway Company.

"Filed January 16th, 1908. John Hall, Clerk of the District Court."

69 In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Motion to File Amended and Supplemental Answer.

Now comes the Defendant, The Missouri Pacific Railway Company, and asks leave of Court to file an amended and supplemental answer,—a copy of which is hereto attached.

BURNHAM, DASHIELL & MICHAELSON,
W. P. WAGGENER,
B. P. WAGGENER,
Attorneys for Defendant, The Mo. Pac. Ry. Company.

70 In the Distroct Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Amended and Supplemental Answer.

Now comes the Defendant, The Missouri Pacific Railway Company, and, for its amended and supplemental answer herein, says:

First.

That since filing of the original answer herein the said Defendant has ascertained that the excess charge collected by Defendant's agent was the result of a mistake on the part of said Agent, and was not the result of any intention on the part of said Agent or said Defendant to violate said law, although Defendant claims that said law is unconstitutional and void, as alleged in the original answer filed herein; and said Defendant now here offers to confess judg-

ment for the full amount of said alleged excess, to-wit: $3.12, with interest thereon from December 27th, 1906, and for costs of suit, and here brings into open court the said sum aforesaid, and tenders it to the said Plaintiff.

BURNHAM, DASHIELL & MICHAELSON,
W. P. WAGGENER,
B. P. WAGGENER,
Attorneys for Defendant, Mo. Pac. Ry. Company.

"Filed February 13th, 1908. John Hall, Clerk."

71 In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Application for Reference.

Now comes the above named Defendant, The Missouri Pacific Railway Company, and represents to the Court, that the chief issue to be tried herein is whether or not the maximum oil rates, as established by chapter 353, Laws of Kansas 1905, in an act entitled: "An Act to establish maximum rates for the transportation of crude oil, and the products thereof, to forbid rebates, and provide penalties for the violation thereof", to deprive the defendant company of the use of its property without due process of law; and whether or not the rates fixed by said act of the legislature are unreasonable and unjust,—whether the same are compensatory or not.

That to properly determine such questions, it will be necessary to examine all of the books of the Defendant Company, showing the receipts and disbursements of said company, and will involve an examination of many thousand pages of book accounts and innumerable disbursement vouchers. Defendant further says that the taking of an account from said books and vouchers will be necessary in order to inform the Court before judgment can be properly rendered herein.

72 Wherefore the Defendant, The Missouri Pacific Railway Company asks that the Court appoint some suitable person to make an examination of said books, book accounts, and disbursement vouchers, and to report to this Court the result of such investigation.

F. T. BURNHAM,
W. P. WAGGENER,
B. P. WAGGENER,
Attorneys for Defendant.

STATE OF KANSAS,
Atchison County, ss:

W. P. Waggener, being first duly sworn, upon oath, deposes and says that he is one of the duly authorized attorneys for the Defend-

ant, The Missouri Pacific Railway Company, and is well acquainted with the issues in the above entitled cause, as made by the pleadings therein,—and he further states that all matters stated in the foregoing application are true.

W. P. WAGGENER.

Subscribed and sworn to before me this 18th day of April, 1908.

NETTIE RAY CLUTE,
Notary Public.

[SEAL.]

My commission expires February 3d, 1909.

"Filed April 20th, 1908. John Hall, Clerk of the District Court."

73 In the District Court of Mitchell County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Journal Entry.

And now, to-wit, on this 20th day of April, A. D. 1908, being one of the regular days of the April Term, 1908, of the District Court, in and for Mitchell County, Kansas, R. M. Pickler judge presiding, the Plaintiff being present in Court in person and by his attorney, and the Defendant being present by its Attorneys: Upon agreement of the parties in open Court, it is ordered and the court hereby doth order, that change of venue be and it hereby is granted in this cause to the District Court in and for Osborne County, the costs of said change of venue and all of the costs in this cause to date, to be borne by said Defendant, The Missouri Pacific R'y Company, and said Defendant in open court waives all questions of jurisdiction consequent upon said change of venue, said cause to stand for trial at the May term, A. D. 1908, of said District Court of Osborne County.

It is further ordered that the Clerk of this Court prepare transcript of the record in this cause for said change of venue at the re-
74 quest of either party; and transmit the same to the Clerk of the District Court of Osborne County, the costs thereof to be paid by said Defendant, The Missouri Pacific Railway Company.

R. M. PICKLER,
Judge of Said Court.

O. K.
R. H. TOWNE,
For Plaintiff.
B. P. WAGGENER,
Attorney for Defendant.

"Filed May 12th, 1908. John Hall, Clerk Dist. Court."

STATE OF KANSAS,
Mitchell County, ss:

John Hall, Clerk of the District Court of Mitchell County, of the State of Kansas, sitting within and for the county aforesaid, do hereby certify *that* the above and foregoing to be a true, full and complete transcript of the record and files in the therein entitled cause, as the same remains on file in my office.

Witness my hand and the seal of said Court, affixed at my office in Beloit, this the 12th day of May, A. D. 1908.

JOHN HALL,
[SEAL.] *Clerk of the Dist. Court.*

Costs of Transcript $5.75.

On the back of said Transcript, omitting the title of said cause, appears the following endorsement:

"Filed May 13th, 1908. B. F. Yost, Clerk Dist. Court."

75 That thereafter, and on the 14th day of May, 1908, the Defendant, The Missouri Pacific Railway Company filed its motion for judgment in favor of the Defendant on the pleadings, which said motion appears in words and figures as follows:

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Motion for Judgment on Pleadings.

Defendant moves for judgment on the pleadings, because the said act of the Legislature upon which said action is founded, is void, as being in violation of and in conflict with the 14th amendment to the constitution of the United States.

C. H. NICHOLAS,
B. P. WAGGENER,
Attorneys for Defendant.

On the back of said Motion, omitting the title of said cause appears the following endorsement:

"Filed May 14th, 1908. B. F. Yost, Clerk Dist. Court."

76 That thereafter, and on the 14th day of May, 1908, it being one of the regular days of the May 1908 term of the District Court of Osborne County, Kansas, the above case came up for hearing on the motion of the Defendant for judgment on the pleadings, and the Plaintiff appeared in person, and by his Attorney, R. H. Towne, and the Defendant, The Missouri Pacific Railway Company by its Attorneys, B. P. Waggener and C. H. Nicholas, and after said motion was presented and argued to the Court, by the Attorneys for both Plaintiff and Defendant, and after consideration,

the Court overruled said motion, to which ruling of the Court, the Defendant then and there duly excepted.

77 That thereafter, and on the 15 day of May, 1908, the same being one of the regular days of the May 1908 term of the District Court of Osborne County, Kansas, this cause comes on for trial upon its merits, the Plaintiff J. W. Tucker appeared in person and by his attorney of Record, R. H. Towne, and the Defendant, The Missouri Pacific Railway Company by its Attorneys, B. P. Waggener and C. H. Nicholas, and both parties announced their readiness for trial, and the Court announcing its readiness to proceed with the trial, no jury having been demanded, and having been waived by consent of both parties, the case proceeded to trial upon its merits.

That thereupon said Plaintiff and Defendant produced and examined the following witnesses in the following order, who testified as follows:

Plaintiff's Evidence.

Mr. J. W. TUCKER, a witness of lawful age, on the part of the Plaintiff, having first been duly cautioned, examined and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

Questions by Mr. R. H. TOWNE:

Mr. WAGGENER: We object to any evidence under the Amended Petition, because it does not state facts such as to constitute a cause of action against the Defendant, because the Act of the

78 Legislature upon which the same is founded, being Chapter 353 of the Laws of Kansas, 1905,—being an act entitled: "An Act to establish maximum rates for the transportation of crude oil and the products thereof, to forbid rebates, and provide penalties for the violation thereof", is unconstitutional and void, and conflicts with the 14th amendment of the Constitution of the United States, and denies the Defendant the equal protection of the Law, as provided by the Statute; and that the Statute is void on its face, and that the Plaintiff, therefore, cannot maintain this action.

The COURT: I will overrule this objection, for the present.

To which the Defendant, at the time duly excepted.

Q. State your name?

A. J. W. Tucker.

Q. You are a resident of Cawker City, Kansas, Mitchell County? And have made your business that of a lawyer?

A. Yes, sir.

Q. Is Cawker City situated on a Railroad line?

A. Yes, sir.

Q. What Railroad?

A. Central Branch of the Missouri Pacific Railway Company, through Cawker City, I believe.

Q. Do you know the distance from Concordia to Cawker City?
A. Yes, sir.
Q. Over the line of railroad?
A. Yes, sir.
Q. What is that distance?
A. Forty-seven miles.
Q. I will ask you if about the middle of last December, you received any shipments over the line of that railroad, about the middle of December, 1906?
79 A. Little later than the middle of December,—on or about the 27th day of December, 1906, I received a shipment that came over the Missouri Pacific Railway lines.
Q. What was that shipment?
A. Twenty-five barrels of fuel Oil—distillate Oil.
Q. Do you know the original shipping point?
A. Yes, sir.
Q. What was the original shipping point?
A. Humboldt, Kansas.
Q. Do you know the way the oil was routed from Humboldt, Kansas, to Cawker City?
A. I believe so.
Q. State the route?
A. Over the Santa Fe Railroad Company's line via Concordia; from Concordia over the Central Branch, over the Missouri Pacific Railway Company's line to Cawker City.
Q. Mr. Tucker, I will ask you if these bills on page- three to six both inclusive——

Mr. WAGGENER: It is admitted by the Defendant that "Exhibit A" and "Exhibit B" attached to Plaintiff's Amended Petition, are correct copies of the original Bills of Lading, or shipping receipts and expense bills.

Q. I will ask you to refer to these papers, "Exhibits 'A' and B" and state the charge which was made for that shipment?
A. "Exhibit B" was presented to me for payment.
Q. State the circumstances under which you received them?
A. On or about the 27th day of December, 1906, the Drayman at Cawker City, Kansas presented "Exhibit B" to me, which was the expense-bill, and asked for the payment of $15.02 as freight charges for the 25 barrels of oil, or fuel distillate oil, which had been shipped to me.
Q. What was the weight of the oil, with the barrels containing it?
A. About 10,432 pounds.
80 Q. State what occurred?
A. I examined it and looked it over to see where the Shipment of oil was from, the amount shipped, the weight of the oil and barrels, and what the rates were, and figured out what it amounted to, then looked up the Law of 1905, on the rate, as I had occasion to look up this rate previously on other shipments, and figured out that the rate of Seven Dollars on the shipment to Concordia was about the regular rate provided for such shipment. I told the Dray-

man at that time I thought they had over charged me, that I didn't want to pay that amount, and for him to take the bill back to the Agent, C. H. Pugh, Station Agent for the Missouri Pacific Railway Company at Cawker City, at that time. He took the bill——

Q. (Interrupting.) Did you see him again with reference to it?

A. Yes, sir; the same Drayman, Mr. W. J. Marihugh, came back and presented the same expense bill to me. He told me the Agent had sent orders that I was to either pay that bill as it was or for him to return the goods to the Railroad Company. I told him that I objected to paying that amount and knew it was an overcharge.

Q. That is the bill of lading?

A. I had the bill of lading, he had the expense bill. He said that the Agent instructed him that I must pay it or the goods would have to be returned, so I paid him the money in full for the expense bill, $15.02, being $7.30 freight from Concordia according to the bill, and $7.72 advanced charges.

Q. State, if you know what the advance charges represented?

A. I believe I know. I think it represents the charge of the Santa Fe for hauling the oil up to and delivering it to the Missouri
81 Pacific Railway Company, at Concordia.

Q. How long after the bill was first tendered to you, did you pay it?

A. My recollection is, that it was the next day after it was tendered.

Q. You received the oil, did you?

A. Yes, sir.

Q. With the Bill of Lading?

A. Yes, sir; the oil had been delivered in my care, really before the bill was presented. Seemed to be the custom there.

Q. What further was said, if anything?

A. I am not certain that anything further was said, although it is possible I may have called Mr. Pugh up, over the telephone. Had been in the habit of doing that, when I had any business.

Q. What talk did you have with him, over the phone?

A. I can't state positively, that I talked with him at that time.

Q. Did you see Mr. Pugh with reference to it?

A. Yes, sir.

A. Yes, sir; I saw Mr. Pugh, afterwards.

Q. What conversation did you have with him?

—. To the best of my recollection, I simply told him the same facts, that he had charged me more than the regular rate for the shipment of oil. I paid something like three-dollars more than was due.

Q. Which constituted the regular rate of the shipment from Concordia to Cawker City?

A. Yes, sir.

Q. What is the rate at the Statutory figure?

A. Figure the legal rate from Concordia, the total would have been about $12.00.

Q. From Concordia figuring the regular rate what would the total expense be?

A. About $15.02.

82 Q. From Concordia to Cawker City.

Mr. WAGGENER: Object to that for the reason that it is an opinion of the witness as to the regular rate from Concordia to Cawker City.

The Court sustained said objection, to which ruling of the Court, the Plaintiff at the time duly excepted.

Q. Have you made that computation, Mr. Tucker?

A. I believe so; yes, sir.

The COURT: The amount is not material, the question is an overcharge.

Mr. WAGGENER: Have you got it figured?

Q. State the amount?

A. The freight rate on the wright of the shipment from Concordia to Cawker City according to the Statutory rate should have been about $5.73.

Q. And what was the charge?

A. $7.30.

Cross-examination.

Questions by Mr. WAGGENER:

Q. Do you know what the distance is from Humboldt to Cawker City?

A. By hearsay, only.

Q. Do you know what road it was shipped over? I expect it came over the Santa Fe, is that right?

A. Yes, sir.

Q. You don't know how many miles it traverses?

A. Only by the figures given to me, that is all.

Q. By whom?

A. Different parties.

Q. And who were the different parties?

A. Mr. Pugh, the Agent at Cawker City.

83 Q. He gave you figures?

A. Yes, sir.

Q. Do you know whether that shipment from Humboldt came Via Kansas City or Topeka?

A. I don't know, but I think it came——

Q. (Interrupting.) Which way did it come? Which way do you think it came?

A. I think it came by Strong City.

Q. What made you think that?

A. My recollection is, that Mr. Pugh figured that with me.

Q. There is a line out of Humboldt to Kansas City?

A. I think so.

Q. And a line Via Topeka from Humboldt?

A. I don't know exactly.

Q. Do you know the distance from Humboldt to Kansas City, or via the Topeka route? Do you know whether or not there is switching charges there at Concordia?

A. No, sir; I do not know, positively.
Q. Do you know whether or not the Santa Fe delivered it to the Missouri Pacific in train or on track or whether the Missouri Pacific took it from the Santa Fe?
A. No, sir; I do not, positively.
Q. Do you know what the established switching charges are on the transfer of freight?
A. I do not; no, sir.
Q. What kind of oil did you say that was?
A. Fuel Oil, or it is called Distillate.
Q. What is that?
A. Grade of fuel Oil.
Q. Experienced in the oil business as well as the Law business? Handled a good deal of oil?
A. No, sir.
Q. Are you in the oil business?
A. Only on a small scale.
Q. To what extent?
A. Well, I purchased this oil because I was interested in the investigation for fuel purposes.
84 Q. Did you purchase this oil, for the purpose of getting a foundation for a law suit?
A. No, sir; I did not.
Q. Was this oil used for fuel purposes?
A. Yes, sir.

Redirect examination.

Questions by Mr. TOWNE:

Q. Upon payment of the amount stated by you, was the expense bill delivered to you receipted as it is now?
A. Yes, sir.
Q. Do you know the signature of the receipting party?
A. I know his handwriting.
Q. Mr. Tucker, do you know the price of oil in the vicinity of Cawker City, in 1905?

Mr. WAGGENER: Object to that for the reason that it is incompetent, irrelevant and immaterial, and without issue in this case.

The Court, sustained said objection, to which ruling of the Court, the plaintiff at the time duly excepted.

Q. What was the price of petroleum, the fair cash market value or the selling price of petroleum about Cawker City the latter part of 1905?

Mr. WAGGENER: Object to that for the reason that it is incompetent, irrelevant and immaterial.

The Court, sustained said objection, to which ruling of the Court, the Plaintiff at the time duly excepted.

85 Q. I will ask you if you know the price of oil, the usual selling price of oil at retail, in and about Cawker City, at the present time?

Mr. WAGGENER: Object to that for the reason that it is incompetent, irrelevant and immaterial, and not an issue in this case.
The Court, sustained said objection; to which ruling of the Court, the Plaintiff at the time duly excepted.

Q. What is that price, Mr. Tucker?

Mr. WAGGENER: Object for the reason that it is incompetent, irrelevant and immaterial, and not an issue in this case.
The Court, sustained said objection; to which ruling of the Court, the Plaintiff at the time duly excepted.

Witness excused.

86 W. D. MARIHUGH, a witness on the part of the Plaintiff, having first been duly cautioned, examined and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

Questions by Mr. TOWNE:

Q. State your name?
A. W. D. Marihugh.

Mr. WAGGENER: It is admitted by the Defendant, that it delivered the oil to the Plaintiff, Tucker, and that the amount, $15.02 was paid by Mr. Tucker to the witness, Marihugh, who took it back to the Agent of the Missouri Pacific Railway Company. He then returned the expense bill to Mr. Pugh, the Agent for the Missouri Pacific Railway Company, and told Mr. Pugh that Mr. Tucker objected to paying that amount of freight, for the reason it was an overcharge, and that Mr. Pugh told the Witness, Marihugh, to tell Mr. Tucker that he must pay the full amount of the bill, or return the oil with bills.
It is admitted by this Defendant, that it is a railway corporation, and as such, a common carrier.

Mr. TOWNE: The Plaintiff rests.
Witness excused.

87 Mr. WAGGENER: We wish to file a demurrer to the evidence of the Plaintiff.
The Defendant, The Missouri Pacific Railway Company, by its Attorneys, B. P. Waggener and C. H. Nicholas, then filed in open Court, its demurrer to the evidence of the Plaintiff, which said demurrer appears in words and figures as follows:

In the District Court of Osborne County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Demurrer.

Comes now the Defendant, The Missouri Pacific Railway Company, and demurs to the evidence of the Plaintiff for the reason that the same fails to prove or establish facts sufficient to constitute any cause of action in favor of the Plaintiff and against the Defendant herein.

C. H. NICHOLAS,
B. P. WAGGENER,
Attorneys for Defendant.

On the back of said Demurrer, omitting the title of said cause, appears the following endorsement:
"Filed May 16th, 1908. B. F. Yost, Clerk District Court."

88 Immediately thereupon, said demurrer came up for hearing, and the Plaintiff being present in person, and by his Attorney, R. H. Towne, and the Defendant, The Missouri Pacific Railway Company, appearing by it Attorneys, B. P. Waggener and C. H. Nicholas, said demurrer was argued by both Counsel for the Plaintiff, and Counsel for the Defendant, and after argument, and consideration by the Court, the Court overruled said demurrer, to which ruling of the Court, the Defendant at the time duly excepted.

Defendant's Evidence.

MR. A. DE BERNARDI, a witness of lawful age, on the part of the Defendant, having first been duly cautioned, examined and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

Questions by Mr. B. P. WAGGENER:

Q. State your name?
A. A. De Bernardi.
Q. What is your business?
A. I am Superintendent of the Omaha and Northern Kansas Division of the Missouri Pacific Railway.
Q. How long have you been employed by the Missouri Pacific Railway Company?
A. Twenty-six years, approximately.
Q. And in the capacity, during the last three years as General Superintendent?

89 A. Except the past two months, I was Superintendent.

Q. And as such, do you have charge of the Central Branch Division of the Missouri Pacific Railway Company, from Atchison, West?

A. Yes, sir.

Q. Approximately, what is the distance?

A. 388 miles to the Central Branch, proper.

Q. Are you familiar with the line of railroad, known as the Atchison, Topeka and Santa Fe?

A. Only in a general way.

Q. Do you know whether that line operates a road from Humboldt to Concordia, Kansas?

A. Yes, sir.

Q. What is the distance from Humboldt to Concordia, via Kansas City and Topeka, approximately?

A. I think about 260 miles.

Mr. TOWNE: We object to that for the reason that it is immaterial.

The Court, sustained said objection; to which ruling of the Court, the Defendant at the time duly excepted.

Q. What is the distance, approximately, between Humbodt, via Kansas City and Topeka, to Concordia?

Mr. TOWNE: Object to that for the reason that it is incompetent, irrelevant and immaterial.

The Court overruled said objection; to which ruling of the Court, the Plaintiff at the time duly excepted.

A. I don't know the exact distance, but I think it is about 350 to 360 miles.

Q. During the time you have been in the service of the
90 Railway Company, what experience have you had in the operation of lines?

A. I have been in the operating Department for about twelve years.

Q. And as such, have you become familiar with the cost of transportation?

A. Yes, sir.

Q. Have you figured up the cost of the transportation of 10432 pounds of oil, or twenty-five barrels, from Concordia to Cawker City, in December, 1906?

Mr. TOWNE: Object to that for the reason that it is incompetent, irrelevant and immaterial.

The Court, overruled said objection; to which ruling of the Court, the plaintiff at the time duly excepted.

Q. Have you figured it up?

A. Yes, sir.

Q. Will you state the cost, if you know; the elements and various items that enter into the cost of transportation?

A. Yes, sir. I will say that my figures do not include the entire cost.

Q. What figures have you.

A. The salaries of the Dispatchers, Operators, Agents, maintenance of way, Maintenance of equipment——

Q. (Interrupting.) What have you included in your estimate?

A. I included simply the cost of the train crew that it required to handle the oil, the cost of the engine and crew, the fuel, the cost of the oil, that is necessary to lubricate the engine and train.

Q. What would be the cost on that basis, to transport that 25 barrels of oil, from Concordia to Cawker City, in December, 1906?

A. $13.00, including the transfer charges and car service.

Q. That does not include the fixed charges, and salaries of officers and Station Agents?

91 A. Maintenance of way, Equipment, General Operators, necessary for transfer, only.

Q. It cannot be handled for less than eight dollars?

A. No, sir.

Q. You have included in that, the transfer charges and car-service? What do you mean by that?

A. The amount it is necessary for the Company to pay the Santa Fe for cars and hauling.

Q. What was it at that time?

A. Fifty cents per day.

Q. How many days would you have that car in your service or possession, before you would return it to the Santa Fe?

A. At least four days.

Q. Do you know the cost of transfer charges at Concordia at that time?

A. Two dollars.

Q. Per car?

A. Yes, sir; that is the minimum.

Q. Kindly explain to the Court the circumstances and character of the shipment of oil, as compared with other commodities; the difficulties surrounding it, and explain fully about the way oil can be loaded in the cars; why it cannot be loaded with other merchandise?

A. I am quite familiar with handling oil for I had charge of the Southern Kansas Division, where there was a great amount of oil taken out, and where I made shipment to Kansas City, it was necessary to erect separate platforms, because of the greasy nature of the oil, and necessitated the erection of separate platforms separate from the one the other merchandise was loaded from, and for that reason, the reason that it would damage the other merchandise, the oil must be loaded in separate cars, for the same reason that separate platforms must be furnished.

Q. Suppose you have one barrel of oil and other commodities? Is the one barrel to be shipped in another car, or with the

92 other commodities?

A. No, sir; it would go in another car.

Q. What would be the reason, if any?

A. For the reason that a car with that character of freight could be damaged, should the barrel break or something like that occur, and for the reason that the oil is of a greasy nature.

Q. What other damages, if any, attending the shipment of oil?
A. It is combustible, and the rules require that the oil be loaded at a distance from the engine.
Q. Owing to the nature of this, additional service must be required?
A. Yes, sir.
Q. And if the oil has to be transferred from one road to another the same care must be observed in its handling, and requires more attention and service?
A. Yes, sir.
Q. From your experience in the Railway service, and your familiarity with the operations of roads and cars, and the cost and expense thereto, is the rate fixed by the Kansas Statute, compensatory?

Mr. TOWNE: I object for the reason that it is incompetent, irrelevant and immaterial, and a conclusion.
The Court, sustained said objection; to which ruling of the Court, the Defendant duly excepted, at the time.

Cross-examination.

Questions by Mr. R. H. TOWNE:

Q. Mr. De Barnardi, I will get you to state what are the factors going to make up the figures you mentioned for shipping?
93 A. I took into consideration, only the services of the train crew, the engine crew, the handling of the engine and turning the engine at the round-house, the coal burned, the oil and waste necessary to lubricate the engine and train, the switching charge of $2.00 between the two lines at Concordia, and four days' car service at fifty-cents per day. That is the substance of the items.
Q. Is Concordia a Division point?
A. No, sir; it is the point where we got the shipment.
Q. Does it take four days where there is a Division point, respectively as between points—When the shipment first came on your line, your estimate was where there was no Division point? Where is the next Division Point?
A. Downs is the next Division Point.
Q. And the other one?
A. Greenleaf.
Q. How far is that——
A. (Interrupting.) Ninety-five miles apart.
Q. Concordia is really half-way, being 46.6 miles?
A. About 54 miles from Concordia to Downs.
Q. What portion of the train load did you compute the 25 barrels shipment to be?
A. We handled it in a car used for oil and which is usually handled in a car by itself as a carload. I took the average loads per train, and used the simple rule for 12 months, which was thirteen.
Q. For twelve months?
A. The twelve months, I mean preceeding this month. I took the average load for twelve months and divided that by twelve which

gives me one car per train, which is one-twelfth of the train. Now then, reduce that to cost per mile and the charges for this 47 miles to one car is the actual miles handled.

94 Q. What is a carload of oil when it is full?

A. Depends on the kind of a car, a good deal.

Q. About the average? What is the maximum carload, I mean taking the expense bills calling for 25 barrels of oil?

A. There is no maximum.

Q. What is the maximum?

A. Do you mean a tank, car? I think 25 is about the largest load I ever saw in a car, as large as I recall.

Q. How much will the tank cars hold?

A. About eight thousand gallons, but I am not sure about that. They hold between eight and ten thousand gallons. Different sizes, however.

Q. The space occupied by the 25 barrels, would be what portion of the space of the car?

A. I wouldn't say as to that, probably one-half of it, or probably more than half of it.

Q. What would be the weight?

A. The weight computed according to the evidence was 10432 pounds.

Q. Trifle over five tons?

A. Yes, sir.

Q. What is the average carload in weight?

A. That depends again, very much.

Q. I mean the average of commodities? I mean the general shipments?

A. Yes, sir; we get different cars that vary in capacity, varying in a shipment of from 20 to 50 tons.

Q. A very large car hold- 50 tons?

A. Yes, sir.

Q. Did your computation include the cost of construction, or was it simply the cost of hauling that particular car?

A. It would not include the small items of maintenance.

Q. You are not prepared to say whether or not this car had any more oil taken out at any other point?

A. Didn't have any more taken out on our line. I don't know what the Santa Fe did with it.

95 Q. You are not prepared to say that there was no more oil in this particular car than the 25 barrels, taken out either before or after its arrival in Concordia?

A. No, it is my understanding that it was a through shipment.

Q. That is, you have a doubt as to this particular car, with reference to its being a straight shipment?

A. In view of those conditions in regard to the handling of this, my understanding is that it was a straight shipment of 25 barrels of oil from Humboldt to Cawker City, and in this one car, clear through.

Q. Now you are taking your figures, and computing entirely upon the proposition of your taking a car at the cost of switching

onto the train, the train crew cost, the coal consumption, the roundhouse service, and that is about all that is included in that?

A. There is other items that I did not give you such as train crew, according to our schedule and the cost of preparing engine for this trip.

Q. Is not that car service a fixed charge between the different roads?

A. No, sir.

Q. And now, what proportion do you have of foreign cars—do you ordinarily have on the Central Branch?

A. Depends very much upon the quantity of business, and at this time, we haven't very many. The railroads spend a great many thousands of dollars a year for foreign cars, but at the time business was good, we had many foreign cars on our line.

Q. In other words, you do not allow any set-offs for cars that are out in foreign service, as against foreign cars that are in your service?

A. No, sir.

96 Q. Is the per diem figured upon the wear and tear and cost of depreciation of the car, or arbitrary?

A. It was then arbitrary, fifty-cents, it is now twenty-five cents, on account of there being no demand for cars.

Q. What is the average coal consumption upon such a trip?

A. About ten tons.

Q. The 47 miles?

A. As I figure the ten tons, it would be approximately on the 47 mile basis.

Q. As against this particular carload, you would figure about 1/46 of the ten tons?

A. Certainly.

Q. And that would give you the average per car?

A. Yes, sir.

Q. What is the average ton mile rate?

A. I didn't go into those statistics, I didn't undertake to figure out any general operations. I just told you I made——

Q. You are not really prepared to state that there are not commodities some of which are habitually carried at a lower rate? I mean at a loss?

A. If there is any carried at a loss but oil, I don't know it. If there is, I don't know it.

Redirect examination.

Questions by Mr. B. P. Waggener:

Q. Why do you say there is no maximum on oil in cars?

A. Because the law fixing the rate doesn't provide for any maximum, or rates fixing either a minimum.

Witness excused.

97 S. E. Sawyer, a witness of lawful age, having first been duly cautioned, examined and solemnly sworn to testify the

truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

Questions by Mr. B. P. WAGGENER:

Q. State your name?
A. S. E. Sawyer.
Q. Where do you live?
A. St. Louis, Missouri.
Q. What business are you in?
A. I am employed by the Missouri Pacific Railway Company, in the accounting Department.
Q. As such Clerk in such Accounting Department, do you have control and possession of the records, weigh bills, Bills of Lading and records of that character, showing the transportation of freight and passengers, and the expenses in connection?
A. I have access to all of them.
Q. Kept in that building?
A. Yes, sir.
Q. 'Long about January first, were you instructed, with other Accountants to prepare statistics of the earnings and expenses and operations of the Missouri Pacific Railway in Kansas?
A. Yes, sir.
Q. When did that work begin?
A. About the 3d of January, and lasted until January, 1908.
Q. How many persons were there employed?
A. They started with 40, but sometimes nearly every man in the house was employed.
98 Q. In the preparation of these statistics which you have here, how many way bills did you necessarily examine? Approximately?
A. For the Interstate business, I would say about 20 thousand.
Q. And for the Intrastate?
A. I would say about 20 thousand more.
Q. What was the character of the books you had to examine?
A. Well, there were books that were made from way-bills, in volumes and sizes. That was the character of each book.
Q. Have you figured about how long it would take to go through and examine, yourself, and arrive at the results you have?
A. I would take about thirteen or fourteen years, if not more.
Q. I will ask you to examine "C" consisting of pages 1, 2 and 3 and state what that paper is?
A. It is a Statement of Total Earnings and Expenses, State of Kansas, for Six months ending December 31st, 1907.
Q. Now state to the Court whether or not that paper is an absolutely correct statement of the receipts, statements and disbursements for the period of time? If so, state it?
A. It is correct to the best of my knowledge and belief.
Q. State what part you took in this investigation?
A. I am engaged almost exclusively in the compilation of the earnings and expenses, and I have worked on those most of the time.

Q. Where did you get the figures from which you made your compilation?

A. They came from the way-bills, the freight receipts, the Station agents' reports.

Q. There figures were taken from the original papers?

A. Yes, sir.

Q. I will get you to examine "Exhibit D" and state what
99 that purports to be?

A. That is a Statement copied from the "Joint Tariff" No. 8.

Q. Giving what? Giving the rate per ton per Mile on Oil?

A. Yes, sir.

Q. That is from the Joint-Tariff?

A. Yes, sir.

Q. I will get you to examine "Exhibit E" consisting of pages 1, 2 and 3, and get you to state what that purports to be?

A. That is a Statement of the Total earnings and Expenses, State of Kansas, six months ending December 31st, 1907.

Q. Is that taken and compiled from the original papers and books filed in the Accounting Department in St. Louis, Missouri?

A. Yes, sir; the same as the other.

Q. I notice in "Exhibit D" and "Exhibit C" on page three, this statement: "The Intra-State Oil shipments in Kansas and the revenue therefrom, for the months of July and August, 1907, are as follows;" From what source did you get that information?

A. From the original way-bills filed in the Auditor's Office.

Q. Now tell the Court how the business, the Gross earnings, Expenses, Net Earnings of the Missouri Pacific Railway for the year ending December 31st, 1906, compare with the Gross earnings, Expenses and Net Earnings of the same Company in Kansas, for the year ending December 31st, 1907?

Mr. TOWNE: We object to that for the reason that it is incompetent, irrelevant and immaterial.

The Court, sustained said objection; to which ruling of the Court, the Defendant at the time duly excepted.

100 Q. Have you made an examination?

A. Yes, sir.

Q. Do you remember from that examination, whether or not they average about the same?

A. No material differences.

Mr. WAGGENER: I now offer in evidence, "Exhibit C" consisting of pages 1, 2 and 3, and "Exhibit D" and "Exhibit C" consisting of pages 1, 2 and 3 as identified by the witness.

Mr. TOWNE: To which the Plaintiff objects for the reason that the matter which is offered is apparently a summary and a copy of documents which the Plaintiff has had no opportunity of investigating or verifying.

The court, overruled said objection; to which ruling of the Court, the Plaintiff at the time duly excepted.

(Exhibit on next page.)

101 EXHIBIT C.

Page 1.

The Missouri Pacific Railway.

1,990 Miles in Kansas.

Statement of Total Earnings and Expenses, State of Kansas, Six Months Ending December 31st, 1907.

Gross Earnings.

	Freight.	Passenger.	Total.
Freight Revenue	$4,195,731.01	.....	$4,195,731.01
Passenger Revenue	.....	$972,139.70	972,139.70
Mail Revenue	.....	105,194.59	105,194.59
Express Revenue	.....	103,372.29	103,372 29
Other Passenger Revenue	.....	13,423 12	13,423.12
Miscl. Transp't'n Revenue	30,046.58	2,376.39	32,422.97
Other than Transp't'n Rev	66,795.08	11,885.16	78,680.24
Total	$4,292,572.67	$1,208,391.25	$5,500,963.92

Operating Expenses.

	Freight.	Passenger.	Total.
Station and Yard Service	$339,383.82	$62,210.24	$401,594.06
Train Service	268,347.69	102,296.02	370,643.71
Engine Service	609,777.98	246,093.73	855,871.71
Other Transp't'n Expense	155,225.65	67,190.68	222,416.33
Maint. of Way & Struct.	597,540.72	392,309.94	990,850.66
Maint. of Equipment	751,101.10	240,477.35	991,578.45
Traffic Expense	89,355.11	48,500.13	137,855.24
General Expense	116,808 27	81,428.30	198,236.57
Total	$2,927,540.34	$1,241,506.39	$4,169,046.73
Taxes	109,949.51	30,957.20	140,906.71
Rentals	30,292.46	8,529.09	38,821.55
Interest on Bonded Indebtedness	430,742.67	121,279.20	552,021.87
Hire of Equipment	186,968.48	10,791.96	197,760.44
Maint. Fund—Bal.	26,320.94	19,777.17	46,098.11
Casuality Fund—Bal.	20,916.69	9,110.22	30,026.91
Grand Total	$3,732,731.09	$1,441,951.23	$5,174,682.32

Recapitulation—Total Business in Kansas.

	Freight.	Passenger.	Total.
Gross Earnings	$4,292,572.67	$1,208,391.25	$5,500,963.92
Operating Expenses	2,927,540.34	1,241,506.39	4,169,046.73
Net Earnings	$1,365,032.33	Def. $33,115.14	$1,331,917.19
Less—			
Taxes	$109,949.51	30,957.20	140,906.71
Rentals	30,292.46	8,529.09	38,821.55
Interest	430,742.67	121,279.20	552,021.87
Hire of Equipment	186,968.48	10,791.96	197,760.44
Maint. Fund—Bal.	26,320.94	19,777.17	46,098.11
Casuality Fund—Bal.	20,916.69	9,110.22	30,026.91
Total	$805,190.75	$200,444 84	$1,005,635.59
Surplus	559,841.58	Def. 233,559.98	326,281.60

102 EXHIBIT C.

Page 2.

The Missouri Pacific Railway Company.

State of Kansas.

The statement attached, shows the Earnings and Expenses of the lines of the Missouri Pacific Railway Company in the State of Kansas on *all* business, Intra-State and Inter-State.

Additional statistics applying to the total business for six months ending December 31st, 1907, are as follows:

Total Revenue Freight Train Mileage (incl'd'g ¾ mixed train mileage)	1,970,701
Total Loaded Freight Car Mileage	28,573,323
Total Number of Tons of Revenue Freight moved	3,356,870
Total Number of Tons of Revenue Freight moved one mile	513,390,134

	Operating expenses.	Operating expenses including fixed charges.
Average cost per Freight Train Mile (in cents)	148.55	189.41
Average cost per Loaded Freight Car Mile (in cents)	10.25	13.06
Average cost per Ton Mile (in cents)	.570	.727

The earnings on *Intra-State freight* handled in the State of Kansas, included in figures shown on statement attached, divided on the basis of the actual business handled in the months of July and August, 1907, amount to $614,255.02. The Operating Expenses incurred in the handling of *Intra-State freight*, divided on the basis of the earnings shown above, were $586,679.08. The net earnings on *Intra-State freight* and the deficit, after deducting a proportion of the fixed charges of the lines of Kansas, based upon the proportion of Intra-State freight earnings to the total freight earnings are shown below:

Earnings, Expenses, and Net Earnings on Intra-State Freight, State of Kansas, for Six Months Ending December 31st, 1907, Based Upon the Actual Business Handled in July and August, 1907.

Gross Freight Earnings	$614,255.02
Operating Expenses	586,679.08
Net Earnings	27,575.94
Less—	
Taxes	15,733.77
Rentals	4,334.85
Interest	61,639.28
Hire of Equipment	37,468.48
Maint. Fund—Bal.	5,274.72
Casuality Fund—Bal	4,191.70
Total	$128,642.80
Deficit	$101,066.86

103 EXHIBIT C.

Page 3.

No. of tons of Intra-State Freight moved	485,068
No. of tons of Intra-State Freight moved one mile	46,153.773
Average cost per ton per mile (Operating Expenses only)	1.271 cents
Average cost per ton per mile (Operating Expenses including Fixed Charges)	1.555 cents

The Intra-State Oil shipments in Kansas and the revenue therefrom, for the Months of July and August, 1907, are as follows:

	Carload.	Less than carload.	Total.
Number of tons	6,117	518	6,635
No. of ton miles	753,088	45,009	798,097
Revenue	$8,161.40	$634.63	$8,796.03

Average Revenue per ton per mile on both carload and less than carload ..... 1.102 cents

The average cost per ton per mile of all Intra State freight is 1.271 cents and when the fixed charges are added the average cost is 1.55 cents while the average revenue per ton per mile from all Intra-State freight is 1.331 cents.

The freight charges on a shipment of 25 barrels of fuel oil, weighing 10,432 pounds shipped from Humboldt, Kansas to Cawker City,

Kansas, a distance of 300 miles, at the maximum rate fixed by the Kansas statutes (11.5 cents per hundred pounds) would amount to $12.00 or to a rate of .767 cents per ton per mile for a double line shipment, while the average cost of handling Intra-State freight is 1.271 cents per ton per mile and when the fixed charges are added, the cost is 1.550 cents.

104 EXHIBIT D.

Page 1.

Rate per Ton per Mile on Oil Provided for by Joint Freight Tariff No. — 8. 2586-A.

Distance, miles.	Single line rate per 100 lbs.	Rate per ton per mile.	Double line rate per 100 lbs.	Rate per ton per mile.
6	2½ Cts.	8.33 Cts.	4 Cts.	13.67 Cts.
10	3 "	6.00 "	4½ "	9.00 "
15	3½ "	4.66 "	5 "	6.67 "
20	4 "	4.00 "	5½ "	5.50 "
30	4½ "	3.00 "	6 "	4.00 "
40	5 "	2.50 "	6½ "	3.25 "
50	5½ "	2.20 "	7 "	2.80 "
60	6 "	2.00 "	7½ "	2.50 "
80	6½ "	1.62 "	8 "	2.00 "
100	7 "	1.40 "	8½ "	1.70 "
125	7½ "	1.20 "	9 "	1.44 "
150	8 "	1.07 "	9½ "	1.22 "
175	8½ "	.97 "	9½ "	1.09 "
200	9 "	.90 "	10 "	1.00 "
225	9½ "	.84 "	10 "	.89 "
250	10 "	.80 "	10½ "	.84 "
300	11½ "	.77 "	11½ "	.77 "
350	12½ "	.71 "	12½ "	.71 "
400	13½ "	.67 "	13½ "	.67 "
450	14½ "	.64 "	14½ "	.64 "
500	15½ "	.62 "	15½ "	.62 "
550	16 "	.58 "	16 "	.58 "

105 EXHIBIT E.

Page 1.

The Central Branch Railway Company.

353 Miles in Kansas.

Statement of the Total Earnings and Expenses, State of Kansas, Six Months Ending December 31st, 1907.

Gross Earnings.

	Freight	Passenger.	Total.
Freight Revenue	$584,730.18	.....	$584,730.18
Passenger Revenue	.....	$182,222.23	182,222.23
Mail Revenue	.....	25,536.22	25,536.22
Express Revenue	.....	23,831.14	23,831.14
Other Passenger Revenue	.....	3,484.28	3,484.28
Miscl. Transp't'n Revenue	1,474.76	25.60	1,500.36
Other than Transp't'n Revenue	5,021.45	819.36	5,840.81
Total	$591,226.39	$235,918.83	$827,145.22

Operating Expenses.

	Freight.	Passenger.	Total.
Station and Yard Service	$35,760.16	$8,984.66	$44,744.82
Train Service	34,254.91	17,458.33	51,713.24
Engine Service	62,067.39	32,102.66	94,170.05
Other Transp't'n Expense	16,213.12	8,249.14	24,462.26
Maint. of Way & Struct.	101,642.77	71,513.52	173,156.29
Maint. of Equipment	99,727.86	38,791.16	138,519.02
Traffic Expenses	11,306.47	5,844.90	17,151 37
General Expense	16,801.60	13,645.42	30,447.02
Total	$377,774.28	$196,589.79	$574,364.07
Taxes	19,986.68	7,974.54	27,961.22
Rentals	Cr. 2,638.34	Cr. 1,052.68	Cr. 3,691.02
Interest on Bonded Indebtedness	85,189.86	33,990.14	119,180 00
Hire of Equipment	28,787.34	3,473.59	32,260.93
Maint. Fund—Balance	Cr. 6,228.05	337.78	Cr. 5,890.27
Casuality Fund—Balance	1,685.85	Cr. 576.73	1,109.12
Grand Total	$504,557.62	$240,736.43	$745,294.05

Recapitulation—Total Business in Kansas.

	Freight.	Passenger.	Total.
Gross Earnings	$591,226.39	$235,918.83	$827,145.22
Operating Expenses	377,774.28	196,589.79	574,364.07
Net Earnings	$213,452.11	$39,329.04	$252,781.15
Less—			
Taxes	19,986.68	7,974.54	27,961.22
Rentals	Cr. 2,638.34	Cr. 1,052.68	Cr. 3,691.02
Interest	85,189.86	33,990.14	119,180.00
Hire of Equipment	28,787.34	3,473 59	32,260.93
Funds—Balance	Cr. 4,542.20	Cr. 238.95	4,781.15
Total	$126,783 34	$44,146.64	$170,929.98
Surplus	86,668.77 Def.	4,817.60	81,851.17

106 EXHIBIT E.

Page 2.

The Central Branch Railway.

State of Kansas.

The statement attached, shows the Earnings and Expenses of the Central Branch Railway in the State of Kansas on *all* business, Intra-State and Inter-State.

Additional statistics applying to the total business for six months ending December 31st, 1907 are as follows:

Total Revenue Freight Train Mileage (incl'd'g ¾ Mixed train mileage)	303,331
Total Loaded Freight Car Mileage	3,290,569
Total Number of tons of Revenue Freight moved	339,377
Total No. of tons of Revenue Freight moved one mile	42,779,465

	Operating expenses.	Operating expenses, including fixed charges.
Average cost per freight train mile (in cents)	124.54	166.34
Average cost per loaded freight car (in cents)	11.48	15.33
Average per ton per mile (in cents)	.883	1.179

The Earnings on *Intra-State freight* handled in the State of Kansas included in figures shown on statement attached, divided on the basis of the actual business handled in the months of July and August, 1907, amount to $154,778.08. The Operating Expenses incurred in the handling of *Intra-State freight*, divided on the basis of the earnings shown above, were $131,163.23. The net earnings on *Intra-State freight* and the deficit, after deducting a proportion of the fixed charges of the Central Branch Railway, based upon the proportion of *Intra-State freight* earnings to the total freight earnings are shown below:

Earnings, Expenses and Net Earnings on Intra-State Freight for Six Months Ending December 31st, 1907, Based upon the Actual Business Handled in July and August, 1907.

Gross Freight Earnings	$154,778.08
Operating Expenses	131,163.23
Net Earnings	$23,614.85
Less—	
Taxes	5,232.51
Rentals	Cr. 690.72
Interest	22,302.71
Hire of Equipment	9,994.96
Maint. Fund—Bal.	Cr. 2,162.38
Casualties Fund—Bal.	585.33
Total	$35,262.41
Deficit	$11,647.56

No. of tons Intra-State freight moved	70,387
No. of tons Intra-State freight moved one mile	7,931,313

107 EXHIBIT E.

Page 3.

Average cost per ton per mile (Operating Expense only)	1.654 Cents
Average cost per ton per mile (Operating Expenses including Fixed Charges)	2.098 Cents

The Intra-State Oil shipments in Kansas and the revenue therefrom for the months of July and August, 1907, are as follows:

	Carload.	Less than carload.	Total.
No. of tons	332	146	478
No. of tons one Mile	15,261	15,944	31,205
Revenue	$301.07	$186.42	$487.49

Average Revenue per ton per mile on both carload and less than carload	1.562 Cents

The average cost per ton per mile of all Intra-State freight is 1,654 cents and when the fixed charges are added, the average cost is 2.098 cents while the average revenue per ton per mile from all Intra-State freight is 1.951 cents.

The freight charges on a shipment of 25 barrels of fuel oil, weigh-

ing 10,432 pounds, shipped from Humboldt, Kansas, to Cawker City, Kansas, a distance of 300 miles, at the maximum rate fixed by the Kansas statutes (11.5 cents per hundred pounds) would amount to $12.00 or to a rate of .767 cents per ton per mile for a double line shipment while the average cost of handling *Intra-State freight* is 1.654 cents per ton per mile and when the fixed charges are added the cost is 2.098 cents.

108 Q. Mr. Sawyer, can you state to the Court, the number of miles of railroad operated by the Missouri Pacific Railroad Company in Kansas, exclusive of the Central Branch?

A. 1990.

Q. How many miles included in the Central Branch Division?

A. 388 miles.

Q. Can you state what the average amount of the bonded indebtedness of these lines in Kansas was, say in December, 1906 and subsequent?

Mr. Towne: Object to that for the reason that it is incompetent, irrelevant and immaterial, and not the best evidence.

The Court, overruled said objection; to which ruling of the Court, the Plaintiff at the time duly excepted.

A. The Bonded indebtedness of the Missouri Pacific Railway Company, is, I believe $16,000.00, and of the Central Branch Division a little less than that. I should estimate it at $15,500.00.

Q. What rate of interest do the bonds bear?

A. There is a little difference; some from four to six per cent.

Q. I understand the statement which you have prepared in giving the earnings, you state the interest giving a certain amount as a fixed charge that represents the interest on the bonded indebtedness of these lines?

A. Yes, sir.

Q. I notice on page 2, "Exhibit C" you have an item of Average cost per freight Train Mile (in cents) As I understand it, that operating expense is how much? How do you arrive at it?

A. By dividing the operating expense by the total freight train mileage in the State of Kansas.

109 Q. What is it?

A. 184.55.

Q. That is the operating expense?

A. Yes, sir.

Q. What is it including the operating expenses, fixed charges and taxes and interest?

A. 189.41; yes, sir.

Q. Average cost per Loaded Freight Car Mile, what is that?

A. 10.25.

Q. That includes the operating expenses?

A. Yes, sir.

Q. What is it, including the Operating Expenses, taxes and fixed charges?

A. 13.06.

Q. Average cost per ton mile in cents?
A. .570.
Q. That includes the operating expenses?
A. Yes, sir.
Q. And including the Fixed charges and expense, how much is it?
A. .727.
Q. On page three of "Exhibit C" I notice you have an item of Intra-State Oil shipments in Kansas, and the revenue therefrom, for the months of July and August, 1907? You state here that the average per ton mile is 1.102? How do you arrive at that?
A. The cost which you refer to, is made by the number of tons.
Q. You mean of oil shipment?
A. They divide the revenue received from the oil by the number of ton miles of oil handled.
Q. That is the revenue?
A. Yes, sir.
Q. What is the cost per ton mile of carload lots, or less?
A. I can't give you that figure.
Q. Do you know what the cost per ton mile of all Intra-State freight is?
A. Yes, sir.
Q. How much?
A. 1.271 cents.
Q. That is for operating expense?
A. Yes, sir.
Q. What is the same for fixed charges added to the average cost?
A. 1.55 cents.
110 Q. What is the average revenue per ton mile from all Intra-State freight, per mile?
A. 1.331 cents.
Q. To make a shipment of 25 barrels of fuel oil weighing 10,432 pounds from Humboldt, Kansas to Cawker City, Kansas, it would be listed upon the basis of what?
A. Per Ton Mile.
Q. On a double line shipment?
A. .767 cents.
Q. What would be the average cost of handling that freight per ton Mile?
A. The average cost of 1.271 cents per mile.
Q. Does that include the fixed charges?
A. No, sir.
Q. What is it when they are added?
A. When the fixed charges are added, the cost is then, 1.550 cents per ton mile.
Q. That would be about one half the cost of handling Intra-State freight?

Mr. TOWNE: Object to that for the reason that it is incompetent, irrelevant and immaterial, and calls for a conclusion.

The Court sustained said objection; to which ruling of the Court, the Defendant at the time duly excepted.

Q. I notice you have a statement here on page two of "Exhibit C" that shows a Deficit of $101,066.00?
A. 86 cents isn't it?
Q. Covering what period is that?
A. Last six months of 1907. Six months ending December 1st.
Q. Based upon the actual business, for what month handled?
A. Based upon the actual business handled for July and August, 1907.
Q. What items are included to make up that deficit?
A. The operating expenses and the fixed charges.
111 Q. You mean by that, that all the Gross Earnings are included?
A. That is the Gross Earnings.
Q. That deficit amounts to how much?
A. $101,066.86.
Q. Is that a statement based on the business actually handled?

Mr. TOWNE: Object to that as incompetent, irrelevant and immaterial.

The Court overruled said objection; to which ruling of the Court, the Plaintiff at the time duly excepted.

A. Yes, sir.
Q. Do you know the difference in cost in handling Inter-State and Intra-State by per cent? By actual computation.
A. We estimate 50 per cent.
Q. That is to say that Intra-State costs more by 50 per cent than Inter-State business in proportion to the earnings?
A. Yes, sir.

Cross-examination.

Questions by Mr. TOWNE:

Q. I presume the difference is due to that fact, is it not that the Inter-State business is a longer haul than Intra-State business?
A. I can only give my opinion on that.
Q. It is not a matter of real knowledge, simply judgment?
A. My judgment would be based upon expert testimony I have read on the subject.
Q. But what is the chief cause of that difference?
112 A. Well, I should say the chief cause would be the double terminal.
Q. That is the chief cause?
A. I should say so, according to the expert testimony on that that I have read,
Q. The answers which you made, have been based on the computation before you?
A. Yes, sir.
Q. And that you made in your computation of the general examination of the affairs of the Company?
A. Yes, sir.

Q. In your examination, did you depend on the original records or transcripts?

A. My own examination.

Q. Your own examination?

A. My examination is the final result of the men working on this the figures are taken from the original way-bills and reports and then a summary.

Q. Those figures were given to you, and you made the final computation, therefrom?

A. Yes, sir.

Q. Those were all brought in and finally summarized in the Auditor's office?

A. Yes, sir.

Q. How many men did you say were working on this?

A. For awhile there was forty men all the time, and we have had between 70 and 80 on the statement.

Q. How long a period did your examination cover? I mean what period did your statement cover?

A. A period of six months ending December 31st, 1907.

Q. That is from July first to December 31st?

A. Yes, sir.

Q. Of that year?

A. Yes, sir.

Q. And how in making up the summary—how were you making it? In Book-form or loose-leaf form?

A. In book form.

Q. The ultimate result of these different summaries—The first summary was made by the entry from the original voucher?

A. From some of them.

113 Q. How much work did you check over, personally?

A. As far as the expenses are concerned, I checked more or less off that each month.

Q. In computing the expense of transporting material for the company's use, did your computation include charges as against the shipment of these supplies, or were they shipped to you dead-head.

A. Dead-head company's material.

Q. You would not be prepared to say, Mr. Sawyer, what would be the coal consumed per ton mile aside from what you might make in your computation?

A. We show on statements these computations.

Q. You could not tell how much coal would be consumed in an ordinary locomotive, in an hour for instance?

A. No, sir.

Q. You simply take your results of the computations which you have, from the records of the Company?

A. Yes, sir.

Redirect examination.

Questions by Mr. B. P. WAGGENER:

Q. Is there a separate account kept—material account—and shipment of the material used by the Company, and the expense of it?
A. Material account is kept separate.

Mr. TOWNE: We move to strike out all the evidence of this witness upon the grounds the whole is not the best evidence; it is incompetent, immaterial and irrelevant, and the witness has not shown any qualification for testifying, and the summaries are not made from original entries, but are copies of the summary itself, and not the best evidence, and which plaintiff has had no opportunity of verifying.

114 The Court overruled said motion; to which ruling of the Court, the Plaintiff at the time duly excepted.

Mr. TOWNE: I wish to make that motion in regard to the Exhibits, as well as to himself.

The Court overruled said motion; to which ruling of the Court, the Plaintiff at the time duly excepted.

(Witness excused.)

115 Mr. DE BERNARDI, a witness recalled, on the part of the Defendant, and having hereinbefore been duly cautioned, examined and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

Questions by Mr. B. P. WAGGENER:

Q. Have you made an investigation of your qualifications to testify as to the cost of Intra-State business, freight, etc., as compared with Inter-State business?
A. Yes, sir; I have made an investigation along that line, also read quite a good deal from expert men, who have given their opinion on it.
Q. Taking into consideration your practical experience, and your observation, and your familiarity with the cost of the business, what is difference, if any, between the cost of handling Intra-State freight and Inter-State?
A. In my opinion, the cost would be between three to five times as much to handle Intra-State business as Inter-State.
Q. How do you arrive at that?
A. From the different items of additional expense that go to make that up. Taking up Inter-State traffic, it moves between large centers in Eastern and Western States and its movement is in a heavy stream in large volumes, and on account of this full car capacity and engine rating is obtainable at the least possible cost in wages for train crews, and with a minimum amount of station or telegraph service. On account of this movement between large
116 centers, a return load for the equipment is usually obtainable, while in the case of Intra-State or local business, situation

and conditions are entirely different, particularly so on many of the Missouri Pacific lines in Kansas, which are practically only long spurs; the country traversed in many cases being sparsely settled, with only small towns to receive or originate business; short hauls on freight, and through a greater part of the year, east-bound tonnage is not available, necessitating the return of power and equipment, with no net or revenue tonnage available.

Some of our spurs only cover the little towns and surrounding territory, and very frequently only get a load one way for our equipment. That necessitates hauling the equipment back at an increased cost, and Inter-State business is kept going for the entire 24 hours.

Q. What are the conditions under which this increase in cost is incurred?

A. Local train service, in the matter of cost, is a fixed arbitrary train mileage, running daily except Sunday, over all parts of the system, as nearly as possible by daylight, and must be furnished regardless of the amount of tonnage offered. Through business is adjusted according to the freight offered; when no freight to move, no expense for train service, power etc., is entailed.

In handling local business, the rate of wages is considerably higher than through freight. There are many reasons why the service should be handled in daylight; and because of this from one to two additional men are required to make out the crew, and taking all this into consideration, when the power and equipment
117 are laid up at night, it causes a loss to both, of at least ten hours out of the twenty-four.

Also what repairing to power and equipment there is to be done, must necessarily be done at night, or on Sundays, and at that time, the mechanics are usually paid one and one-half hours for the one hour service, that is, pay and one-half.

Then there is the switching industry tracks, on whose account the lightest power is used, reducing the possible train haul, and consequently the revenue, to a minimum, the wages of the crew being the same, regardless of the tonnage handled.

To make it possible for local trains to get over the road in daylight, so that packages may be more carefully examined for their delivery, they are always run approximately 75 per cent light of engine rating, and on account of making deliveries along the line, either car-load or less-car-load freight, they frequently leave initial terminal with 75 (or more) per cent of their rating, and arrive at opposite terminal with practically no freight. This is particularly true of branch lines in Kansas, and on account of pick-up freight along the line, they may be forced to leave terminal with practically no freight, arriving at opposite terminal with their rating, but a large per cent of it being a very short haul, probably picked up at the last two or three stations on the train.

The character of freight usually handled on local trains is light, and with prompt delivery in view, usually necessitates light loading of cars, to the extent that, as a rule, the net tonnage handled on

through trains, I mean the net tonnage per local trains, does not exceed 45 or 50 per cent of the net tonnage handled on through
118 trains. By this, it requires at least double the amount of equipment to handle the same amount of traffic.

Then again, another reason is the lack of a sufficient volume of business at local stations to keep the necessary force employed for the remainder of the day, after the local trains have been taken care of, yet the force must be paid by the day or month, and kept in service. The majority of this force would not be needed for through traffic.

Then on account of very light loading in the handling of local freight, packages, etc., the average loading per car is about four tons, as against the capacity of the car in handling a great deal of the through business, which would run from thirty to fifty tons, and creates a waste, because the cost of transportation is measured by the ton and not the car.

We use approximately 50 per cent more fuel on local trains than on through trains, on account of the frequent stopping and starting and switching industry tracks long hours on the road and many other things in the way of delays. And on account of station switching, and loading and unloading L. C. L. freight, local divisions are frequently less than 100 miles in length, for which 100 full miles are paid train and engine crews; and the crews are much longer on the road, and earning a larger percentage of overtime.

Then another difference between the handling of state and interstate freight; the revenue for all transportation companies is dependent upon the net tons hauled one mile, and the rates are largely based thereon: An engine might be rated at 1000 tons on a 100 mile division. If the thousand tons is handled over the entire division, they would have made 100,000 ton miles, while if
119 the same train is handled only ten miles and set out, they have only made 10,000 ton miles, or approximately one-tenth of the revenue that would have been earned had the entire tonnage been handled through.

By net tons, I refer to freight only, but of course it requires just as much power to handle a ton of material which goes to make up a car, as it does to handle the freight, therefore we designate as between gross and net tons.

There is a much greater strain and wear, and liability for damage to equipment on account of frequent stopping and starting of local trains, and these local trains necessarily mean a greater number of dispatchers and additional work of the dispatching offices.

Owing to all these, and the double terminal expense, I figure that from two-thirds to three-fourths of the station expenses of local stations and telegraph offices is chargeable to state freight.

It is a recognized fact that the most complex problem given railway officers for solution today, arises from the handling of local traffic, and all things considered, in my opinion, it costs about five times as much to handle this class of freight as it does to handle through Inter-State traffic.

Q. What would be the difference in the cost of handling a car from Concordia to Cawker City, if it had one barrel of oil, or 25 barrels in a carload?

A. Practically no difference—very little difference.

Q. Approximately what would it cost on that same shipment from Humboldt to Cawker City, via Santa Fe, we will say per mile, as you would approximate it?

A. Aside from the switching charges and car service, it would cost I think about six cents per mile.

120 Q. That wouldn't include car service or switching charges or fixed charges, interest and taxes or maintenance of way?

A. No, sir.

Q. Or maintenance of equipment?

A. No, sir.

Q. About six cents per mile?

A. Yes, sir.

Q. I mean a car mile?

A. Yes, sir.

Q. Assuming then, that the distance from Humboldt to Cawker City, was three hundred miles, the costs per car mile not including switching, interest, taxes or maintenance of equipment, would be six cents per mile?

A. I think that is very close to it.

Cross-examination.

Questions by Mr. R. H. TOWNE:

Q. Do you know the distance from Whiting, Indiana, to Dolton, Illinois?

A. No, sir.

Q. Assuming that the distance is 281 miles, what would be the cost of transporting oil in barrels from Whiting or Dolton to St. Louis—the rates being the same?

Mr. WAGGENER: Object to that for the reason that it is incompetent, irrelevant and immaterial; and not proper cross-examination; and not an issue in this case.

Q. (Resuming:) I am assuming that the grades back there are about the same? Do you know generally about the Santa Fe?

A. I don't know exactly what this would be.

Q. Did you say, Mr. De Barnardi, that the commodities rate—What is the difference between a commodity-rate and a class-rate?

121 A. I don't know, as I know very little about rates in the operating department or maintenance.

Q. The distance to Whiting is 18 miles from Chicago and 300 over the Belt Line from Chicago to St. Louis. Is six cents for the 281 mile trip, compensatory, to your judgment?

Mr. WAGGENER: We object to that for the reason that it is not proper cross-examination.

The Court sustained said objection; to which ruling of the Court, the Plaintiff at the time duly excepted.

(Witness excused.)

Mr. WAGGENER: The defense rests.

122 Mr. SAWYER, a witness in rebuttal on the part of the Plaintiff having been hereinbefore duly cautioned, examined and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

Questions by Mr. R. H. TOWNE:

Q. Are you prepared to say what part of "Exhibit C" was made by you from the original records?

A. The revenues were taken from the ledgers of the Company on file in the office.

Q. Were those books original?

A. Yes, sir.

Q. Was there any part of that "Exhibit C" that was taken by you from original documents of all the operating expenses, or were they taken from the original documents and given to you by the department handling that item of expense? Did you make that compilation yourself?

A. I have taken a copy of the statement here and verified the figures. The compilation was made by men.

Q. You checked them over with the ledger entry?

A. Yes, sir; we count the ledgers original.

Q. Was this verified in the different Departments?

A. The figures stand on our books.

Q. Did you secure "Exhibit D" under the same conditions? Is that made in the same way?

A. "Exhibit D" is a copy from the joint-Tariff business by the Company.

Q. And "Exhibit E" in the same manner as "Exhibit C"?

A. Yes, sir.

123 Cross-examination.

Questions by Mr. B. P. WAGGENER:

Q. You state that you have verified these statistics from the original entries of the ledger of the Company?

A. Yes, sir.

Q. So that you know from this verification that these figures are right?

A. Yes, sir.

Q. State whether or not it would be practicable—I will make it stronger. Would it be possible for any one man to get these figures that are given here in that same length of time, and go over the books in the same period of time?

A. No, sir.

Q. How long would it take to do that?
A. Eleven or Twelve years to go through all of them.

Mr. TOWNE: I wish to make a motion to strike out "Exhibit C" for the reason that it is manifestly not made from original documents having original entries that it is made up from. It is simply a copy made from the copy made by parties who were not under oath; and is not the best evidence. Incompetent, irrelevant and immaterial.

The Court, overruled said motion; to which ruling of the court, the Plaintiff at the time duly excepted.

Mr. TOWNE: I make the same motion to "Exhibit E," that it is incompetent, irrelevant and immaterial; not being a copy of the original documents or entries, but made as a copy of a copy made by other parties without oath; and no opportunity for the ex-
124 amination of the figures by the Plaintiff; not the best evidence, and merely a conclusion of the witness.

The COURT: It is one of the elements that go to make up the estimate as to what the cost is per mile. It seems to be impossible to procure that evidence in any other manner. It seems to be the only practical way in which to get this information. Motion to strike out "Exhibit E" as being incompetent, irrelevant and immaterial and not the best evidence, is overruled.

To which ruling of the Court, the Plaintiff at the time duly excepted.

Mr. WAGGENER: It is agreed that application was made by this Defendant, to appoint a referee to take this evidence, to which Counsel for the Plaintiff objected and objection was sustained.

(Witness excused.)

125 Mr. ANSLEE, a witness in rebuttal on the part of the Plaintiff, having been first duly cautioned, examined and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

Questions of Mr. R. H. TOWNE:

Q. I will ask you to turn to your record of shipment of in-freight for August 23, last?

—. ——— ———.

Q. State your name?
A. John B. Anslee.
Q. What is your occupation?
A. That of a Railway Telegrapher and Agent.
Q. By whom are you employed?
A. The Missouri Pacific Railway Company.
Q. Will you turn to your record of in-freight of August 23d, 1907, please?

—. ———.

Q. Do you find there an incoming shipment of freight, a small shipment of oil from Concordia on the 23d of August last?

—. ———.

Q. Day before or after?
A. Consigned to who?
Q. Mr. Berger.
A. No, sir; I do not seem to find it. Have you got any better reference you could give me better than that? I have a second here, a shipment from Concordia to Mr. Berger.
Q. What is shown by your record there?
A. It shows way-bill 827. No. 1011 item. 51 cents paid.
Q. It does not show a record of the particular shipment?
126 A. It does not name any commodity, and we have no book that does, for in-freight business.
Q. These are bills issued by you, are they not? (indicating papers marked Plaintiff's Exhibit F 1, Plaintiff's Exhibit F 2 and Plaintiff's Exhibit F 3).
A. They are made there under My Agency. Those sheets are not made by me, but by my help. I don't think that is my handwriting.
Q. They were issued from the station in your charge?
A. Yes, sir.
Q. I will ask you what is the distance from Concordia to Osborne over the line of the Missouri Pacific Railway.
A. In the neighborhood of 64 or 65 miles, somewhere along there.
Q. It is 64 miles to Beloit——
A. (Interrupting.) That is my mistake. Between 60 and 65 miles I should say.

Mr. TOWNE: We now offer in evidence, Plaintiff's "Exhibits F-1, F-2 and F-3."

Mr. WAGGENER: To which the Defendant objects for the reason that it is incompetent, irrelevant and immaterial, and no proper foundation having been laid.

The Court, overruled said objection; to which ruling of the Court, the Defendant at the time duly excepted.

127 "EXHIBIT F-1."

Form 1149. Rev.

Claims for Overcharge, Loss or Damage must invariably be accompanied by original bills of lading and expense bills.
Attach to them bill against Company, giving particulars.

Ex. Bill No. 775.

Osborne Station Division C. B. 1907.

M— W. Berger

To the Missouri Pacific Railway Company, Dr.

E. B. No. —.	For transportation and charges on—	Weight.	Rate.	Freight charges.	Advance charges.
Where from: Concordia.					
Consignor: S. F.	5 Bbls. Oil.	2000	42	90	
Way-bill No. 811.					
Car No. 4139.					
Car In.: I. M. S.					
Date of W. B.: 8/22/01.					
Transferred from car —.					

Received Payment.

J. B. ANSLEY, *Agent.*

Paid.

Cartage.....

Total Charges.....

*Ch-rges payable on delivery. Goods to be removed within twenty-four hours after arrival.

128 "EXHIBIT F-2."

Form 1149. Rev.

Claims for Overcharge, Loss or Damage must invariably be accompanied by original bills of lading and expense bills.
Attach to them bill against Company, giving particulars.

Ex. Bill. No. 1046.

Osborne Station Division C. B. 1907.

M— W. Berger

To the Missouri Pacific Railway Company, Dr.

E. B. No. —.	For transportation and charges on—	Weight.	Rate.	Freight charges.	Advance charges.
Where from: Concordia. Consignor: S. F. Way-bill No. 1011. Car No. 69114. Car In.: C. M. & St. P. Date of W. B.: 8/27/07. Transferred from car 8452 N. C. L.	3 Bbls. Gaso.	1200	4½	57	

Received payment.

J. B. ANSLEY, *Agent.*

Paid.

Cartage..... 35

Total Charges..... 35

*Ch-rges payable on delivery. Goods to be removed within twenty-four hours after arrival.

129 "EXHIBIT F-3."

Form 1149. Rev.

Claims for Overcharge, Loss or Damage must invariably be accompanied by original bills of lading and expense bills.
Attach to them bill against Company, giving particulars.

Ex. Bill No. 538.

Osborne Station Division 11-9, 1907.

M— W. Berger

To the Missouri Pacific Railway Company, Dr.

E. B. No. —.	For transportation and charges on—	Weight.	Rate.	Freight charges.	Advance charges.
Where from: Concordia. Consignor: S. F. Way-bill No. 394. Car No. 38909. Car In.: M. P. Date of W. B.: 11/16/07. Transferred from car —.	4 Bbls. Gaso.	1600	.....	69	

Received payment.

J. B. ANSLEY, *Agent.*

Paid.

Cartage..... .....

Total Charges .....

* Ch-rges payable on delivery. Goods to be removed within twenty-four hours after arrival.

130 Cross-examination.

Questions by Mr. B. P. WAGGENER:

Q. Do you know where this shipment originated?
A. No, sir; I do not.
Q. Whether single or double line shipment?
A. I couldn't say.
Q. Where does the Consignee live?
A. Here. His name is Berger.
Q. Mr. Berger?
A. Yes, sir.
Q. What is his first name?
A. I believe he is called Will.
Q. He is the Consignee in all cases?
A. Yes, sir.

Q. You don't know with certainty, whether this shipment came from beyond Concordia?
A. No, sir; I do not.
Q. You don't know over what line it came?
A. I couldn't say.
Q. Who made these figures?
A. Mr. Elmer Dobbins.

(Witness excused.)

131 Mr. K. M. WHARRY, a witness on the part of the Defendant, in Sur-Rebuttal, having first been duly cautioned, examined and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

Questions by Mr. B. P. WAGGENER:

Q. State your name?
A. K. M. Wharry.
Q. Where do you reside?
A. Kansas City.
Q. What is your business?
A. General Freight Agent of the Missouri Pacific Railway Company.
Q. Are you familiar with the traffic operations of the Company?
A. I am.
Q. Will you take these bills and explain to the Court, how that rate is fixed, if you know? (Counsel hands Witness bills.)
Q. These expense bills—Do you know where the shipments originated?
A. The forms show that they were delivered to the Missouri Pacific Railway Company, by the Santa Fe, at Concordia. The Statutes provide the rate on oil between the points in Kansas, providing a single-line rate and a double line-rate. When the movement is over two lines, the Statutes do not provide for any difference of double-line rate.
Q. That rate, whatever it is, 4½ cents, would not signify that that was less than the Statutory rate on the entire shipment?
A. No.

132 Q. Suppose that oil was shipped from Chanute, Kansas to Osborne, Kansas, would that be over the Santa Fe?
A. They have a line to Chanute, Kansas; yes, sir.
Q. What is the distance from Chanute to Concordia over the Santa Fe?
A. Two hundred and seventy-five miles.

Mr. WAGGENER: It is here admitted that the Consignee in the receipts marked "Exhibits F-1, F-2 and F-3" got this oil from Chanute, Kansas shipped to Osborne, Kansas via the Atchison, Topeka & Santa Fe Railroad and the Missouri Pacific Railroad; and it was a double line shipment.

Q. Were there any advance charges on those expense bills?

A. No advance charges, but the expense bill shows that the advance charges were paid.

Q. By whom?

A. The Consignor.

Q. To the point named, that is, the initial point named in the expense bill?

A. Possibly. I can't tell whether it was paid or how much was paid.

Q. There is nothing to indicate whether there were any transfer charges or not, or what the transfer charges were on these expense bills?

A. Well, it is simply a matter of inference.

Q. And in fact it is simply a matter of inference as to whether or not it was a single or double line shipments?

A. The expense bills show that they were received from the Santa Fe from Concordia.

133 Q. Do you know whether those were a double line shipment?

A. I can't, by the expense bills.

Q. There is nothing that would indicate that?

A. Nothing that would indicate that to me on those documents.

(Witness excused.)

134 Mr. DE BERNARDI, a witness, on the part of the Defendant, in sur-rebuttal, having been hereinbefore duly cautioned, examined and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

Questions by Mr. B. P. WAGGENER:

Q. State whether or not the lines, the Atchison, Topeka and Santa Fe and the Missouri Pacific are so constructed at Concordia that transfer may be made direct from one car to the other?

A. No, sir.

Q. That would necessitate the goods being carted across?

A. Either by dray or switch-engine.

Mr. WAGGENER: The Defendant rests.

Mr. TOWNE: I wish to offer in evidence, expense bill of shipment to Hal. Neiswanger, Osborne station, dated January 11th, 1907.

Mr. WAGGENER: We object for the reason that it is not an issue in this case, and is incompetent, irrelevant and immaterial, and has not been properly identified.

The COURT: It has not been identified.

To which ruling of the court, the Plaintiff at the time duly excepted.

135 Mr. TOWNE: The Plaintiff rests.

Mr. WAGGENER: The Defense rests.

The above and foregoing is all the evidence offered and all the evidence introduced on the trial of the above entitled case.

Immediately thereupon, and after both Plaintiff and Defendant had rested, the case proceeded on argument by the Counsel for the Plaintiff and Counsel for the Defendant, the Plaintiff appearing in person, and by his Attorney, R. H. Towne, and the Defendant, the Missouri Pacific Railway Company appeared by its Attorneys, B. P. Waggener and C. H. Nicholas, and after the argument had been concluded, the Court having been fully advised in the premises and after consideration the Court made the following finding:

136 The COURT: On consideration, I find against the defendant, and in favor of the plaintiff, for the sum of Five hundred dollars, and the costs of this action.

137 That thereafter, and on the 16th day of May, 1908, the Defendant, The Missouri Pacific Railway Company, filed in the office of the Clerk of the District Court, its Motion for a New Trial, which said motion appears in words and figures as follows:

STATE OF KANSAS,
Osborne County, ss:

In the District Court Sitting in and for the County of Osborne in the State of Kansas.

No. —.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Now comes the Defendant and moves the Court for a new trial of the above entitled cause for the following reasons, to-wit:

1st. Irregularity in the proceedings of the Court, and prevailing party, abuse of discretion by which the Defendant was prevented from having a fair trial.

2nd. Accident and surprise which ordinary prudence could not have guarded against.

3rd. Excessive damages appearing to have been given under the influence of passion and prejudice.

4th. Error in the assessment of the amount of recovery being too great.

138 5th. The decision is not sustained by sufficient evidence and is contrary to law.

6th. Newly discovered evidence material to said Defendant which could not with reasonable diligence, have been discovered and produced at the trial.

7th. Error of law occurring at the trial and excepted to at the time by said Defendant, The Missouri Pacific Railway Company.

NOTE.—Affidavits and other evidence will be used on the hearing of said motion.

B. P. WAGGENER AND
CHAS. H. NICHOLAS,
Attorneys for said Defendant.

On the back of said motion for New Trial, omitting the title of said cause, appears the following endorsement:

"Filed May 16th, 1908. B. F. Yost, Clerk District Court."

That thereafter and on the 16th day of May, 1908, it being one of the days of the regular May 1908 term of the District Court of Osborne County, Kansas, this cause came on for hearing on Motion for a New Trial by the Defendant, the Plaintiff appearing in person, and by his Attorney, R. H. Towne, and the Defendant appeared by its Attorneys, B. P. Waggener and C. H. Nicholas, and after argument of both Counsel for Plaintiff and Counsel for Defense, and after consideration, the Court overruled said motion, to which
139 ruling of the Court, the Defendant at the time duly excepted thereto.

That the Court thereupon on said 16th day of May, 1908, immediately after the overruling of said motion for a new trial, and during said May, 1908, term of said court, and for good cause shown and on motion of the Defendant, therefore Plaintiff consenting granted said Defendant, to and including the 1st day of October, 1908, in which to make and serve, or file a record and case made for the Supreme Court, according to law.

And by agreement of parties, execution was stayed by the Court, till and including November 1st, 1908, without bond; Journal Entry of Judgment being in words and figures as follows:

140 In the District Court of Osborne County, Kansas.

J. W. TUCKER, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Journal Entry.

And now on the 14th day of May, 1908, this cause came on for hearing on motion for judgment in favor of the Defendant on the pleadings, that day filed by the Defendant. The Plaintiff appeared in person and by R. H. Towne, his Attorney, and the Defendant appeared by C. H. Nicholas and B. P. Waggener its Attorneys, and said motion was read to the Court and argument upon said motion was heard on behalf of the Plaintiff and of the Defendant, and said motion was submitted to the Court, which said motion the Court, after consideration, overruled, the Defendant excepting to such ruling of the Court.

And now on this 15th day of May, 1908, the above cause came on for hearing upon its merits, the Plaintiff appeared in person and by R. H. Towne his Attorney, and the Defendant appeared by
141 C. H. Nicholas and B. P. Waggener, its Attorneys, and a jury being waived, the Plaintiff then stated his case and a statement was likewise made by the Counsel for the Defendant. The Plaintiff then introduced his evidence and rested his case.

And thereupon as soon as the Plaintiff had rested his case, the

Defendant filed its demurrer to the evidence, which demurrer was presented and argued to the Court by Counsel for the Defense and Counsel for the Plaintiff, and which demurrer was after consideration by the Court overruled, the Defendant excepting to such ruling of the Court. The Defendant then introduced its evidence and rested its case, and the Plaintiff then introduced his evidence in rebuttal and rested his case, the Defendant then offered its evidence in sur-rebuttal and rested its case. The cause was then presented and argued to the Court by Counsel for the Defense and Counsel for the Plaintiff, and submitted to the Court for its decision, and after due consideration of said cause, the Court finds the issues of this case in favor of the Plaintiff, that the allegations in his petition have been sustained by the evidence, and that he ought to recover in this action. It is therefore considered and adjudged that the Plaintiff have and recover of the Defendant the sum of Five Hundred (500.00) Dollars together with interest at the rate of six per cent per annum from this, the 15th day of May, 1908, and the costs of this action to be taxed by the Clerk in the sum of $—, to the rendition of such judgment, the Defendant excepted.

142 Immediately after the rendition of said judgment and on the said 15th day of May, 1908, the Defendant filed its motion for a new trial, and which said motion was then and there on said 15th day of May, 1908, taken up for hearing, the Plaintiff appeared in person and by R. H. Towne his Attorney, and the Defendant by C. H. Nicholas and B. P. Waggener, its Attorneys, and said motion was read, presented, argued and submitted to the Court by Counsel for the Defendant and Counsel for the Plaintiff, and which said motion, after consideration was by the Court, — overruled, to which ruling of the Court, the Defendant then and there excepted.

This cause then came up on motion of the Defendant for additional time in which to make and serve or file a case — for the Supreme Court, said motion was then and there heard on the said 15th day of May, 1908, and there appeared at such hearing C. H. Nicholas and B. P. Waggener, Attorneys for the Defendant and R. H. Towne, Attorney for the Plaintiff, and said motion was heard and was submitted to the Court, and which said motion, after consideration, was by the Court sustained and for good cause shown the Defendant was allowed till and including the 1st day of October, 1908 to make and serve or file case-made for the Supreme Court, and by agreement of parties the Court orders that execution shall be stayed upon said judgment till and including November 1st, 1908, without bond.

R. M. PICKLER, *Judge.*

143 This case-made contains full, true and correct copies of all the pleadings, motions and demurrers filed in this case; full true and correct copies of all orders, rulings, judgments, and decisions of the Court; and all entries made upon the journal in this case; full, true and correct transcript of all the evidence and testimony offered and admitted during the trial, of the case, together

with a record of all objections and oral motions made during the trial, of the rulings of the Court thereon and of the exceptions saved to such rulings. And this case-made contains a full, true and correct transcript of the record and a full, true and correct record of all the proceedings of the Court in this case.

GEO. D. PICKLER,
Official Reporter.

Stenographer's Receipt.

I have this day received from the Defendant in this action the sum of $49.50 in full compensation for this transcript of evidence and case-made for the Supreme Court.

Smith Center, Kansas, September 19, 1908.

———.

Filed Oct. 22, 1908.
D. A. VALENTINE,
Clerk Supreme Court.

The above and foregoing case-made for the Supreme Court has been this day served upon us, and we do hereby acknowledge the service of the same.

Osborne, Kansas, Sept. 19, 1908.

R. H. TOWNE,
Attorney for Plaintiff.

144 In the District Court of Osborne County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Amendments Suggested by Plaintiff.

In the above entitled case, Plaintiff suggests the following amendments to the case-made as made and served by the Defendant.

145 In the District Court of Osborne County, Kansas.

J. W. TUCKER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

I, the undersigned, Judge of the District Court of Osborne County, Kansas, hereby certify that the foregoing was presented to me as a case-made in this action above entitled, that at the time of such presentation both Plaintiff and Defendant were present by their Attorneys, and I now settle and sign the same as a true and correct case-made, and direct that it be attested and filed by the Clerk of the Court.

Witness mt hand, at Beloit in Kansas, this 29 day of Sept., A. D. 1908.

R. M. PICKLER,
District Judge.

Attest:
B. F. YOST, *Clerk,*
By E. Y. MORRIS, *D'p'ty.*

Filed September 30th, 1908.
[SEAL.]
B. F. YOST, *Clerk,*
By E. Y. MORRIS, *D'p'ty.*

Filed Oct. 22, 1908.

D. A. VALENTINE,
Clerk Supreme Court.

146 In the Supreme Court of the State of Kansas.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
J. W. TUCKER, Defendant in Error.

Entry of Appearance.

I hereby waive the issuance and service of summons in the above entitled cause, in the above entitled court, and here enter the appearance of the defendant in error.

RICHARD H. TOWNE,
Attorney for Defendant in Error.

Endorsed: 16208. Mo. Pac. Ry. Co. vs. Tucker. Waiver. Filed Oct. 22, 1908. D. A. Valentine, Clerk Supreme Court

147 Be it further remembered, that afterwards on the 7th day of February, A. D. 1910, the same being one of the regular judicial days of the January term, 1910, of the supreme court of the state of Kansas, before said court in session at the supreme court room in the city of Topeka, the following proceeding among others was had, and is entered of record as follows, to-wi-:

148 Page 397, Journal "NN."

In the Supreme Court of the State of Kansas.

MONDAY, *February 7th,* 1910.

No. 16208.

THE MO. PAC. R'L'Y CO., Pl'ff in Error,
v.
J. W. TUCKER, Def't in Error.

This cause comes on to be heard on the petition in error and transcript of the record of the district court of Osborne county; there-

upon after oral argument by B. P. Waggener for the plaintiff in error and by J. W. Tucker for the defendant in error, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

149 Be it further remembered, that afterwards on the 9th day of April 1910, the same being one of the regular judicial days of the January Term, 1910 of the supreme court of the state of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding among others was had and remains of record at page 583 of Journal "NN" of said court in words and figures as follows, to-wit:—

150 In the Supreme Court of the State of Kansas.

Page 583, Journal "NN."

SATURDAY, *April 9th*, 1910.

J. W. TUCKER, Appellee,
v.
THE MO. PAC. RLY. CO., Appellant.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be *affirmed*. It is further ordered that the appellant pay the costs of this case in this court taxed at $— and hereof let execution issue.

151 And on the same day, to-wit the 9th day of April 1910, there was filed in the office of the clerk of the supreme court of the state of Kansas, the court's syllabus and opinion in said case, which syllabus and opinion are in words and figures, as follows, to-wit:—

152 No. 16208.

J. W. TUCKER, Appellee,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Appeal from Osborne County.

Affirmed.

Syllabus by the Court.

BURCH, *J.*:

1. Chapter 253, Laws of 1905, establishing maximum rates for the transportation of oil, contains but one subject which is clearly expressed in its title.

2. The damages recoverable by an aggrieved shipper under the act referred to do not constitute a fine for the breach of a penal

law, which must go to the school fund under section six of article six of the constitution.

3. The distinction between "single-line rates" and "double-line rates" in the act mentioned is between rates for shipment over a single line and rates for shipment over more than one line.

4. The legislature was justified in segregating the transportation of oil from the transportation of other commodities, in making it the subject of special regulation, and in securing observance of such regulations by the imposition of special penalties.

153 5. The act referred to does not either in express terms or by implication forbid a judicial investigation of the reasonableness of the rates fixed by the legislature and the question is open for determination by any court in which the carrier may be called to account.

6. An opportunity to test once for all in a single suit against some officer or board the reasonableness of legislative rates is not essential to the protection of a carrier asserting that such rates are unreasonable. It is sufficient that the carrier cannot be made to suffer the penalties prescribed until the question of reasonableness has been passed upon by a competent court.

7. The penalties prescribed by the act in question are not so oppressive that their natural effect would be to intimidate carriers from resorting to the courts to test its validity.

8. Acts of the legislature fixing rates for transportation by common carriers will not be held to be unconstitutional on the ground that the rates established are unreasonable without the fullest disclosure of all material facts affecting the question.

9. The evidence in this case is not sufficient to show that the oil rates fixed by the act of 1905 are unreasonable.

All the Justices concurring.

A true copy. Attest:—

____ ____,
Clerk Supreme Court.

154 The opinion of the court was delivered by

BURCH, *J.*:

The plaintiff recovered a judgment of $500 against the defendant for a violation of chapter 353, Laws 1905, establishing maximum rates for the transportation of oil. The defendant appeals and contends the statute violates the constitution of the state of Kansas and the constitution of the United States.

The title of the act reads as follows:

"An act to establish maximum rates for the transportation of crude oil and the products thereof, to forbid rebates, and provide penalties for the violation thereof."

Section 1 fixes maximum rates for the transportation of oil within the state of Kansas by single and by double line shipments.

Section 2 contains the following provisions:

"Every common carrier which shall fail or refuse to accept for

shipment or to properly ship or deliver the products named in section 1 hereof, or which shall demand, exact or receive for such transportation or delivery any sum in excess of the rates herein made lawful, shall be liable to any person injured thereby in the sum of five hundred dollars as liquidated damages, to be recovered by action in any court of competent jurisdiction, together with a reasonable attorney's fee, to be fixed by the court."

Section 3 makes the giving of rebates a misdemeanor punishable by fine and forfeiture of the right to do business.

The defendant claims the title and the body of the act are multifarious. It is plain, however, that a single subject is embraced, the regulation of rates for the transportation of oil and its products, and the statute extends no further than is necessary for efficient regulation. It would be a lame statute if it contained no penalty for its violation. Both civil and criminal remedies may be employed to that end. The remedy by way of damages to the aggrieved
155 shipper is not a fine for a breach of a penal law in the sense of article 6, section 6 of the constitution which provides that moneys derived from that source shall go to the school fund.

It is said the statute denies the defendant the equal protection of the laws guaranteed by the federal constitution because shipments over more than two lines of road are not regulated. This is an unwarranted interpretation of the terms "single-line rates" and "double-line rates" used in the statute. The distinction is between rates for shipment over a single line and rates for shipment over more than one line.

It is said that the act in question discriminates between classes of shippers and favors oil shippers with liquidated damages and attorney fees which are denied to farmers, stockmen and many other persons engaged in reputable pursuits. The carrier in this case is not a shipper and has no legal right to question the classification of members of a group to which it does not belong. It is also said that the statute discriminates between the defendant and other litigants in the matter of attorney fees. There is nothing in the abstract to show that the plaintiff recovered attorney fees, so that the defendant has nothing to complain about in that respect. In view of the defendant's argument, however, it may be observed that for many well understood reasons, which need not be rehearsed here, the legislature was clearly justified in segregating the transportation of oil from the transportation of other commodities, in making it the subject of special regulation and in securing observance of such regulations by the imposition of special penalties. All common carriers of oil, including pipe lines (ch. 315 Laws 1905,) are placed under the liabilities complained of, which satisfies the constitutional provisions which the defendant invokes.

The statute referred to relating to the transportation of oil by pipe lines establishes maximum rates for the service. It
156 then gives the board of railroad commissioners authority to fix rates not to exceed those prescribed by the legislature, and provides that the reasonableness of rates fixed by the board may be tested by proceedings in any court of competent jurisdiction. Until

the board acts the legislative rates are to stand. The act furnishing the basis of the proceedings under consideration contains no provision for a court review of the rates which it promulgates. From these facts the defendant argues that no right of review exists and that consequently it is deprived of the equal protection of the laws and of property without due process of law.

The pipe-line act merely expresses a condition which attaches to all statutes fixing rates or charges for public services unless the legislature has by specific declaration, or by implication equally clear, forbidden an inquiry into the matter of reasonableness. The act in question merely proceeds upon the basis that in the judgment of the legislature that the maximum rates established are reasonable. Prima facie, this conclusion is correct, but there is no intimation that a judicial investigation of the fact of reasonableness is foreclosed and such an investigation may be made in any proceeding in which a carrier is called to account under the act. It is true that under the pipe-line act the reasonableness of rates fixed by the board of railroad commissioners may be tested once for all in an appropriate action against the board. The right to a judicial determination of the question of reasonableness, however, is the matter of essence and substance, and not the matter of procedure; and so long as the defendant cannot be made to suffer until a competent court has passed upon the justice of the legislative rates, the guaranties of the federal constitution are not infringed.

Finally it is said that the legislative rates are in effect made conclusive because the penalties for violating the law are great enough to terrorize carriers into submitting rather than to take the chances of succeeding in a test case. This argument is based on the
157 decision in the case of ex parte Young, 209 U. S., 123. The tenor of that decision is shown by the following extracts from the opinion:

"For disobedience to the freight act the officers, directors, agents and employés of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible, for the company to obtain officers, agents or employees willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the Commission. The company, in order to test the validity of the acts, must find some agent or employé to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Fed-

eral) for the purpose of testing its validity. The officers and employés could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. * * * If the law be such as to make the decision of
158 the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. Chicago &c. Railway Co. v. Minnesota, 134 U. S. 418. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may therefore be said than when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."

Compared with the drastic penalties prescribed by the legislature of the state of Minnesota those of the Kansas statute are mild indeed. The latter are not imposed upon officers, agents or employees, they affect the corporation only, are merely pecuniary, and are neither extravagant nor unreasonable. Therefore the court holds they are not so enormous that their natural effect would be to deter carriers from resorting to the courts to test the validity of the act.

At the trial in the district court the defendant was given an opportunity to show that the statutory rates are unreasonable. It introduced evidence to prove its contention to that effect. The court found otherwise and the finding is assigned as error. The evidence consisted largely of tables of figures compiled by the defendant's statisticians, supplemented by the testimony of two witnesses. It is claimed that the evidence establishes the following facts:

"First. The rate fixed by the statute is not compensatory,
159 and that the actual cost of the service, not including fixed charges, or taxes, is greatly in excess of the maximum revenue allowed by the statute.

"Second. That all the earnings combined of the Company in the state, from domestic business, shows an annual loss or deficit of over $200,000.

"Third. That all of the earnings in the state, from every source, interstate and intra-state, do not show sufficient net revenue to pay to exceed two per cent on one-half of the value of the property, as assessed for taxation."

It is not necessary to analyze this evidence. Some of it is open to the suspicion of want of good faith. Thus the only showing with reference to revenue from intra-state oil shipments consists of receipts for two months of a single year, and those months are July and August. Indeed there is nothing in the evidence showing what a reasonable rate for the transportation of oil would be or that the legislative rates are too low. The figures to the effect that the

Missouri Pacific Railway Company loses money every year on its Kansas business do not tend to show either of these facts. Further suspicion is cast on this evidence by proof presented by the plaintiff showing the defendant voluntarily made double line shipments of oil in less than car-load lots to a non-competitive point beyond the one where this controversy arose at less than the statutory rates. In the case of Chicago &c. Company v. Wellman, 143 U. S. 339, Mr. Justice Brewer pointed out how easily courts might be misled into doing grievous wrong to the public by striking down legislative rate acts on general statements and without the fullest disclosure of all material facts.

In delivering the opinion of the court he said:

"A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54.
160 Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'"

The trial court was correct in holding that the defendant's evidence was not sufficient to prove that the statutory rate is unjustifiably low.

The judgment of the district court is affirmed.

All the Justices concurring.

A true copy. Attest:

____ ____,

Clerk Supreme Court.

161 In the Supreme Court of the State of Kansas.

J. W. TUCKER, Appellee,

v.

THE MO. PAC. RY. CO., Appellant.

I, D. A. Valentine, Clerk of the supreme court of the state of Kansas, do hereby certify that the above and foregoing is a true, full and complete transcript of the record and proceedings in the

case above entitled, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at my office, in Topeka, Kansas, this 30th day of April 1910.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

162 Here follow, the petition for the writ of error, and the order of the Chief Justice allowing the same, the assignments of error, the writ of error, a copy of the appeal bond, the citation with the acceptance of service thereof.

163 In the Supreme Court of the State of Kansas.

No. 16208.

J. W. TUCKER, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Petition for Writ of Error.

The Missouri Pacific Railway Company, the above named appellant, considering itself aggrieved by the final decision of the supreme court of Kansas in rendering judgment against it in the above entitled case, hereby prays that a writ of error be allowed, to the end that the decision and judgment of this Court may be reviewed by the supreme court of the United States, and for an order fixing the amount of the supersedeas bond.

And the said The Missouri Pacific Railway Company, appellant, as grounds for the issuance of said writ of error, alleges the following errors in the record and proceedings of said cause:

First.

The supreme court of Kansas erred in deciding and holding that chapter 353, Laws of Kansas 1905,—being an act entitled: "An Act to establish maximum rates for the transportation of crude oil, and the products thereof, to forbid rebates, and providing penalties for the violation thereof,"—was valid and operative, and that it did not conflict with the Constitution of the United States.

Second.

The said supreme court of Kansas erred in refusing to hold and decide that the said act of the legislature of the state of Kansas, in its enforcement in this action, deprived the said Railway Company of the equal protection of the laws, and deprived it of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

164 Third.

The said supreme court of Kansas erred in holding and deciding that said act of the legislature, to-wit: chapter 353, Laws of Kansas 1905,—did not deprive said Railway Company of the guarantees of the Federal Constitution, and, in its enforcement, operation and effect, did not deprive the said Railway Company of its property without compensation, and without due process of law.

Fourth.

The said supreme court of Kansas erred in holding and deciding that the maximum rates prescribed by said chapter 353, Laws of Kansas 1905, for the transportation of crude oil, and the products thereof, were not confiscatory, and that compliance with said act by the said Railway Company did not deprive it of its property without compensation, without due process of law, and did not deny to it the equal protection of the law.

Fifth.

Said supreme court of Kansas erred in holding and deciding that said act of the legislature of the state of Kansas was not class legislation, and in refusing to hold that it discriminated against railway companies, and in favor of pipe line companies, as provided by chapter 315, Laws of Kansas 1905.

Sixth.

Said supreme court of Kansas erred in holding and deciding that the legislature of the state had the lawful right to, and in so doing did not violate or infringe upon any of the inhibitions of the Federal Constitution, legislate specially as to the transportation of crude oil, and the products thereof, and that, in so doing, it had not discriminated in favor of such commodity, to the great detriment and damage of the Railway Company, the appellant herein.

Seventh.

Said supreme court of Kansas erred in holding and deciding that, on the evidence disclosed by the record, the maximum rates prescribed by said statute were compensatory, and the enforcement of the same, under the circumstances as disclosed by the record, did not conflict with any of the rights guaranteed *by* the appellant by the Constitution of the United States.

165 For which errors the said Missouri Pacific Railway Company, appellant, prays that the said judgment of the supreme court of Kansas, *dated* in opinion filed April 9th, 1910, be reversed, and that it be restored to all things it has lost thereby.

B. P. WAGGENER,

——— ———,

Attorneys for Missouri Pacific Railway Company, Appellant.

166 In the Supreme Court of the State of Kansas.

No. 16208.

J. W. TUCKER, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Let the writ of error above prayed for issue upon the execution of a bond by the Missouri Pacific Railway Company, appellant, to the appellee herein, in the sum of two thousand dollars ($2,000.00); said bond, when approved, to act as a supersedeas.

Dated April 21st, 1910.

W. A. JOHNSTON,
Chief Justice Supreme Court, State of Kansas.

167 [Endorsed:] 16208. J. W. Tucker vs. Mo. Pac. Ry. Petition for writ of error. Filed Apr. 21, 1910. D. A. Valentine, Clerk Supreme Court.

168 In the Supreme Court of the State of Kansas.

No. 16208.

J. W. TUCKER, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Journal Entry of Allowance of Writ of Error and Superseding Judgment.

The appellant, The Missouri Pacific Railway Company, having presented its application for a writ of error to the supreme court of the state of Kansas to correct the judgment rendered by the said court against it in the suit wherein J. W. Tucker, was appellee, and The Missouri Pacific Railway Company was appellant, and having presented, with its application, its due assignment of errors in that regard, presents now a citation to be signed.

Accordingly it is ordered that said writ of error be allowed, and said citation signed, upon the said appellant giving to the said appellee a good and sufficient bond, in the sum of two thousand dollars ($2,000.00), conditioned that said appellant shall prosecute its writ of error to effect, and, if it fail to make good its plea, shall answer all damages and costs; said security and bond to be approved by this Court, or one of the Justices thereof, and the writ thereunder to be a supersedeas.

And thereupon said appellant now presents a bond, with a good and sufficient surety, in said sum of two thousand dollars ($2,000.00), as aforesaid, which is approved by the Chief Justice,

and ordered filed with the clerk of the supreme court of the state of Kansas.

W. A. JOHNSTON,
Chief Justice, Supreme Court, State of Kansas.

169 [Endorsed:] 16208. J. W. Tucker vs. Mo. Pac. Rly. Journal Entry allowing writ. Filed Apr. 21, 1910. D. A. Valentine, Clerk Supreme Court.

170 In the Supreme Court of the State of Kansas.

No. 16208.

J. W. TUCKER, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Assignment of Errors.

Now comes the above appellant, The Missouri Pacific Railway Company, and files herewith its petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled case, and, for the purpose of having the same reviewed in the Supreme Court of the United States, it makes the following statement and assignment of said errors:

First. The supreme court of Kansas erred in deciding and holding that chapter 353, Laws of Kansas, 1905,—being an act entitled "An act to establish maximum rates for the transportation of crude oil, and the products thereof, to forbid rebates, and providing penalties for the violation thereof,"—was valid and operative, and that it did not conflict with the Constitution of the United States.

Second. The said supreme court of Kansas erred in refusing to hold and decide that the said act of the legislature of the state of Kansas, in its enforcement in this action, deprived the said railway company of the equal protection of the laws, and deprived it of its property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

Third. The said supreme court of Kansas erred in holding and deciding that said act of the legislature, to-wit: chapter 353, Laws of Kansas, 1905,—did not deprive said railway company of the guarantees of the Federal Constitution, and, in its enforcement, operation and effect, did not deprive the said Railway Company of its property without compensation, and without due process of law.

Fourth. The said supreme court of Kansas erred in holding and deciding that the maximum rates prescribed by said chapter 353, Laws of Kansas 1905, for the transportation of crude oil, and the products thereof, were not confiscatory, and that compliance with said act by the said railway company did not deprive it of its property without compensation, without due process of law, and did not deny to it the equal protection of the law.

Fifth. Said supreme court of Kansas erred in holding and decid-

ing that said act of the legislature of the state of Kansas was not class legislation, and in refusing to hold that it discriminated against railway companies, and in favor of pipe line companies, as provided by chapter 315, Laws of Kansas 1905.

171 Sixth. Said supreme court of Kansas erred in holding and deciding that the legislature of the state had the lawful right to, and in so doing did not violate or infringe upon any of the inhibitions of the Federal Constitution, legislate specially as to the transportation of crude oil, and the products thereof, and that, in so doing, it had not discriminated in favor of such commodity, to the great detriment and damage of the railway company, the appellant herein.

Seventh. Said supreme court of Kansas erred in holding and deciding that, on the evidence disclosed by the record, the maximum rates prescribed by said statute were compensatory, and the enforcement of the same, under the circumstances as disclosed by the record, did not conflict with any of the rights guaranteed to the appellant by the Constitution of the United States.

For which above stated errors the appellant, The Missouri Pacific Railway Company, prays that the judgment of the supreme court of the state of Kansas, dated April 9th, 1910, be reversed, and that it be restored to all things which it has lost thereby.

B. P. WAGGENER,
Attorneys for Appellant, The Missouri Pacific Railway Company.

172 [Endorsed:] 16208. J. W. Tucker vs. Mo. Pac. Rly. Co. Assignment of Errors. Filed Apr. 21, 1910. D. A. Valentine, Clerk Supreme Court.

173 In the Supreme Court of the State of Kansas.

No. 16208.

J. W. TUCKER, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said state, in which a decision could be had in the certain suit between J. W. Tucker and The Missouri Pacific Railway Company, wherein was drawn in question the construction of a clause of the Constitution

of the United States, and likewise the construction of acts of Congress of the United States enacted in pursuance of such Constitution, and wherein was also drawn in question the validity of a statute of the said state of Kansas, and of an authority exercised under said state, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was against the title, right, privilege or exemption specifically set up or claimed under the said Constitution and the said statute, and the said decision was likewise in favor of the validity of said statute of said state, and the authority exercised under it, a manifest error has happened, to the great damage of the Missouri Pacific Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and
174 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof; that the record and proceedings being inspected, the said supreme court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 21 day of April, in the year of our Lord one thousand nine hundred and ten.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT,
Clerk Circuit Court United States,
District of Kansas.

Allowed:

W. A. JOHNSTON,
Chief Justice, Supreme Court, State of Kansas.

175 [Endorsed:] 16208. J. W. Tucker vs. Mo. Pac. Rly. Writ of error. Filed Apr. 21, 1910. D. A. Valentine, Clerk Supreme Court.

176 In the Supreme Court of the State of Kansas.

No. 16208.

J. W. TUCKER, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Bond.

Know all men by these presents, that we, The Missouri Pacific Railway Company, as principal, and W. J. Bailey, as surety, are held and firmly bound unto the appellee herein, J. W. Tucker, in the sum of Two Thousand dollars ($2,000.00), to be paid to him,—for which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents. Sealed with our seals and dated this 21st day of April, 1910.

Whereas, the above bounden, appellant in error, seeks to prosecute its writ of error to the United States Supreme Court, to reverse the judgment rendered in the above entitled action by the supreme court of the state of Kansas, in favor of J. W. Tucker, against the Missouri Pacific Railway Company, and to supersede the said judgment rendered therein.

Now therefore, the condition of this obligation is such that if the above named appellant in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged against it, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

THE MISSOURI PACIFIC RAILWAY COMPANY,
By B. P. WAGGENER,
Its Authorized Attorney.
W. J. BAILEY.

Bond approved and to operate as a supersedeas.

W. A. JOHNSTON,
Chief Justice.

Endorsed: 16208. J. W. Tucker vs. Mo. Pac. Rly. Bond. Filed Apr. 21, 1910. D. A. Valentine, Clerk supreme court.

177 In the Supreme Court of the State of Kansas.

No. 16208.

J. W. TUCKER, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Acceptance of Service of Citation.

I hereby expressly waive service of citation in the above entitled cause this 25th day of April, 1910, said citation being attached hereto.

J. W. TUCKER, *Appellee.*

178 In the Supreme Court of the State of Kansas.

No. 16208.

J. W. TUCKER, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. W. Tucker, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the state of Kansas, wherein the Missouri Pacific Railway Company is appellant in error, and you are appellee in error, to show cause, if any there be, why the judgment rendered against the said appellant in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Kansas, this 21 day of Apr., 1910.

[Seal Supreme Court, State of Kansas.]

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

Attest:
D. A. VALENTINE,
Clerk Supreme Court.

179 [Endorsed:] 16208. J. W. Tucker vs. Mo. Pac. Rly. Citation. Issued April 21, 1910. Returned & filed Apr. 29, 1910. D. A. Valentine, Clerk Supreme Court.

180 SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, clerk of the said court, do hereby certify that there was lodged with me as such clerk on April 21st, 1910, in the case entitled J. W. Tucker, appellee v. The Mo. Pac. Rly. Co. appellant:

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for each appellee, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, Kansas, this 30th day of April, A. D. 1910.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

181 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Kansas, in the city of Topeka, this April 30th, 1910.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

Endorsed on cover: File No. 22,159. Kansas Supreme Court. Term No. 933. The Missouri Pacific Railway Company, plaintiff in error, vs. J. W. Tucker. Filed May 12, 1910. File No. 22,159.

No. [redacted] 17

DEC 27 19

JAMES H. McKE

In the

Supreme Court of the United States

October Term.

THE MISSOURI PACIFIC RAILWAY [redacted],
Plaintiff in Error,

vs.

J. W. TUCKER, *Defendant in Error.*

STATEMENT, BRIEF AND ARGUMENT

BAILEY [redacted],
Attorney for Plaintiff in Error.

Blackmer's Printing Address, [redacted]

In the

Supreme Court of the United States

October Term.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

J. W. TUCKER, *Defendant in Error.*

No. 933.

STATEMENT.

At the session of the Legislature of Kansas, 1905, the following act was passed, *viz.:*

"An Act to establish maximum rates for the transportation of crude oil and the products thereof, to forbid rebates, and provide penalties for the violation thereof.

Be It Enacted by the Legislature of the State of Kansas:

Section 1. From and after the taking effect of this act it shall be unlawful for any common carrier in the State of Kansas to charge,

exact or receive for the transportation of illuminating oil, gasoline, fuel oil or crude petroleum, in cans, barrels, tanks or tank cars, between any points within the State of Kansas, in excess of the following rates for each one hundred pounds:

Distance, Miles.	Column 1, Single-line Rates.	Column 2, Double-line Rates.
6 and less	2.5 cts.	4.0 cts.
10 and over 6	3	4.5
15 and over 10	3.5	5
20 and over 15	4	5.5
30 and over 20	4.5	6
40 and over 30	5	6.5
50 and over 40	5.5	7
60 and over 50	6	7.5
80 and over 60	6.5	8
100 and over 80	7	8.5
125 and over 100	7.5	9
150 and over 125	8	9.5
175 and over 150	8.5	9.5
200 and over 175	9	10
225 and over 200	9.5	10
250 and over 225	10	10.5
Over 250	10.5	10.5

When distance is over two hundred and fifty miles, in addition to above rates add below:

Distance, Miles.	Rates.
50 and less	1.0 ct.
100 and over 50	2
150 and over 100	3
200 and over 150	4
250 and over 200	5
300 and over 250	5.5
Over 300	6

The rates for each and every can, barrel or tank shall be computed on the actual weight of such can, barrel or tank, and the contents thereof; the rate upon every tank-car shall be computed upon the contents of such tank-car, and every such tank-car shall be permitted to contain an amount equal to its full capacity. Every

common carrier which shall fail or refuse to accept for shipment, or to properly ship or deliver the products named in Section 1 hereof, or which shall demand, exact or receive for such transportation or delivery any sum in excess of the rates herein made lawful, shall be liable to any person injured thereby in the sum of five hundred dollars, as liquidated damages, to be recovered by action in any court of competent jurisdiction, together with a reasonable attorney's fee, to be fixed by the court.

Section 3. Provided, that every such common carrier which shall, either directly or indirectly, give any rebate to any such shipper, or ship, or agree to ship, any of the products mentioned in this act for a rate less than that lawfully charged to other shippers under like circumstances, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in the sum of not less than five hundred dollars, and forfeit its charter to do business in this state.

Section 4. This act shall take effect and be in force from and after its publication in the official state paper.

Approved February 17, 1905.

Published in official state paper February 22, 1905."

At the same session, and subsequent thereto, the same Legislature passed the following act, *viz.:*

"An Act relating to the transportation of oil by means of pipe lines.

Be It Enacted by the Legislature of the State of Kansas:

Section 1. All pipe lines laid, built or maintained for the conveyance of crude oil, within the State of Kansas, are hereby declared to be common carriers, and said conveyance of said oil shall be in the manner and under the restrictions in this act provided.

Section 2. It shall be the duty of every person, firm, association or corporation operating such pipe lines to provide suitable and necessary receptacles for receiving such oil, for transportation and for storage, at the place of delivery, until the same can be reasonably removed by the consignee, and shall be liable therefor from the time the same is delivered for transportation until a reasonable time after the same has been transported to the place of consignment, and ready for delivery to the consignee. It shall be the duty of every such person, firm, association or corporation to receive and forward such oil as shall be offered for shipment in the order of application therefor, upon the applicant's complying with the rules herein provided for as to delivery and payment of such transportation. Such common carrier shall issue to the shipper a certificate showing the actual quantity and specific gravity thereof; but no application for such transportation shall be valid beyond or for a greater quantity than the applicant has ready for delivery at the time of making such application.

Section 3. It shall be unlawful for any such person, firm, association or corporation to charge for the transportation of such crude oil through its line in excess of the following rates for each barrel of forty-two gallons transported: Six miles and less, five cents; over six miles and not more than fifteen miles, six cents; over fifteen miles and not more than forty miles, seven cents; over forty miles and not more than eighty miles, eight cents; over eighty miles and not more than 100 miles, ten cents; over 100 miles and not more than 150 miles, fifteen cents; over 150 miles and not more than 200 miles, twenty cents; over 200 miles and not more than 250 miles, twenty-three cents; over 250 miles and not more than 300 miles, twenty-five cents.

Section 4. The State Board of Railroad Commissioners shall have the general super-

vision and control over all such persons, firms, associations or corporations in the performance of said business, and shall prescribe reasonable rules for the conduct thereof, which rules, when prescribed and delivered in writing to any such person, firm, association or corporation, shall be printed and posted up in a convenient, accessible and conspicuous place at each office, station or place of business where such oil is received or delivered. The State Board of Railroad Commissioners is hereby authorized to prescribe reasonable maximum rates, not exceeding the rates set forth in Section 3 hereof, which shall be charged for the transportation of such oil, which rate shall be binding on every such person, firm, association or corporation, after its publication in the official state paper; *provided*, the reasonableness of such rates may be tested by proceedings therefor in any court of competent jurisdiction in this state, and such court shall, upon hearing the same, make such order as shall be proper, and such order may be reviewed by the Supreme Court as other civil proceedings, regardless of sum or value involved; *provided*, before beginning such proceedings in court to test such matters, such person, firm, association or corporation shall execute a bond to the State of Kansas in such reasonable sum as the judge of the court in which such matter is brought shall order, conditioned that the person, firm, association or corporation making such application will promptly pay to any shipper the difference between the rate received for transporting oil and the rate finally ordered by such court. When such maximum rates shall be fixed by the State Board of Railroad Commissioners the rates prescribed in Section 3 of this act shall cease to be of force, and the rates so fixed by the State Board of Railroad Commissioners shall govern, as in this section provided.

Section 5. Any such person, firm, association or corporation which shall fail or refuse to

accept, transport and deliver oil when offered up to the full capacity of such pipe line, at rates not to exceed those provided for by this act, or shall fail, neglect or refuse to obey any rule so established by the State Board of Railroad Commissioners, shall be liable to the person injured by such failure or refusal in the sum of five hundred dollars liquidated damage, together with reasonable attorney's fees, to be fixed by the court, in case suit shall be brought therefor, such liquidated damage and attorney's fees to be recovered in any court of competent jurisdiction; and in case of any corporation so refusing or failing, the charter board is hereby authorized to revoke the charter or permit to do business in this state of such corporation.

Section 6. This act shall take effect and be in force from and after its publication in the official state paper.

Approved February 22d, 1905.

Published in official state paper February 28th, 1905."

The first act cited *supra* was "Senate Bill No. 374," and the second act was "Senate Bill No. 376."

Thereafter, on the 22d day of October, 1907, J. W. Tucker filed his amended petition in the state court against the Missouri Pacific Railway Company and the Atchison, Topeka & Santa Fe Railway Company, as follows, *viz.* (Rec., pp. 11-13):

"AMENDED PETITION.

The above named plaintiff, for his cause of action, states and alleges: That the above named defendants, at all times hereinafter stated and mentioned, were and still are railroad corporations, duly organized, chartered and existing in accordance with the laws of the State of Kansas, and doing business as such corporations

under and by virtue of the laws of said state, and that said defendants were and still are operating its railroads with rolling stock, cars and engines situated thereon, under said corporate capacity, and under and by virtue of the laws of said state, and that said first named defendant's railroad, with rolling stock, passed through the County of Mitchell and State of Kansas, known as the Missouri Pacific Railway Company.

That on or about the 14th day of December, 1906, the Webster Refining Company shipped to said plaintiff, over the railroad lines of said defendants, 25 barrels of a certain product of crude petroleum, commonly known as fuel oil, also known as refined distillate oil, all contained in 25 certain barrels, and delivered the same to said defendant, to be transported by them as such common carriers from Humboldt, in the County of Allen, to Cawker City, in the County of Mitchell—both in the State of Kansas. Such transportation and shipment being wholly within said state, the distance between said point of shipment and destination respectively along the line of shipment and transportation on the railroads of said defendants being 300 miles, such transportation and shipment being 253 miles over the line of railroad of the defendant, the Atchison, Topeka & Santa Fe Railway Company, from Humboldt, the place of shipment, to Concordia, Kansas, and a distance of 47 miles over the line of railroad of the defendant, the Missouri Pacific Railway Company, from Concordia to Cawker City, the place of destination of said shipment, for which transportation and shipment of said oil, in the barrels aforesaid, said defendants were entitled to charge, exact and receive, under the statute of said state in such case made and provided, the sum of 11.5 cents for each 100 pounds of said oil so shipped and transported, including the weight of said barrels in which the same were so transported—such shipment being known as a double line shipment

—the total weight of said barrels and said contents therein having been then and there 10,432 pounds, which, at the rate so fixed by the statute in such case made and provided, amounted in the aggregate to the sum of twelve dollars.

That on or about the 27th day of December, 1906, the said plaintiff received from the said defendant, the Missouri Pacific Railway Company, at its established station in the city of Cawker City, Mitchell County, Kansas, the said 25 barrels and contents of refined distillate fuel oil, through its said regular station, and the general and regular agent, C. H. Pugh, acting on the part of said defendant, demanded, exacted and received of and from the said plaintiff, for the said transportation and shipment of said 25 barrels and the contents thereof of refined distillate fuel oil, the freight charges of fifteen and 2/100 ($15.02) dollars, being in excess of the charge that said defendants were entitled to receive, and against the will of the above named plaintiff. Said charge of $15.02 which was demanded, exacted and received on the part of said defendants from this plaintiff at said time being in excess of the lawful rates for the transportation of said 25 barrels and contents of refined distillate fuel oil from Humboldt, Kansas, to Cawker City, Kansas, to the injury of this plaintiff, and said excess charge of $15.02 was and is in violation of said laws fixing the maximum rate for transportation of crude oil and the products thereof, under Chapter 353 of the Session Laws of 1905 of the State of Kansas, said excess charges that were exacted, demanded and received from the said plaintiff by the said defendants being under said law to the injury and damage to this plaintiff in the sum of $500, liquidated damages, and in a further sum to be fixed by the court as a reasonable attorney's fee for the conducting of this action, and for the recovery of said damages so as aforesaid received.

Wherefore, the plaintiff prays for judgment against the defendants, the Missouri Pacific Railway Company, a corporation, and the Atchison, Topeka & Santa Fe Railway Company, a corporation, in the sum of five hundred dollars, together with his reasonable attorney's fee, to be fixed by the court, the costs of this action, and for such other and further relief as to this court may seem just and equitable.

GEORGE E. TUCKER and
J. W. TUCKER,
Attorneys for Plaintiff."

On the 15th day of November, 1907, the Missouri Pacific Railway Company filed its answer to the amended petition, as follows, *viz.:*

"SEPARATE ANSWER OF THE MISSOURI PACIFIC RAILWAY COMPANY TO AMENDED PETITION.

Now comes the above named defendant, the Missouri Pacific Railway Company, and for its answer to the amended petition filed herein says:

First.

That it admits that it is a corporation, duly chartered, incorporated and existing under the laws of the State of Missouri, and engaged in the operation of a line of railway through the States of Missouri, Kansas, Nebraska and Colorado; and that it is an interstate railway, and subject to the control of the act of Congress to regulate commerce, and the Interstate Commerce Commission, passed in pursuance thereof.

Second.

For further answer, this defendant says that Chapter 353 of the Laws of Kansas, 1905, being an act entitled, 'An Act to establish maximum rates for the transportation of crude oil and the products thereof, to forbid rebates, and provide penalties for the violation thereof,' ap-

proved February 17th, 1905, is unconstitutional and void, in this: that it is an attempt to deprive the said defendant company of the use of its property without due process of law, and to apply the same for public use without just compensation, and is in violation of the Fourteenth Amendment to the Constitution of the United States. That the rates fixed by said act of the Legislature for the transportation of crude oil, and the products thereof, are unreasonable, in this: that they do not furnish sufficient compensation for the service to be performed by the said defendant and other common carriers. That said act of the Legislature under which said plaintiff pretends to bring and prosecute this action was enacted by the Legislature of Kansas without any consideration of the question whether the rates therein prescribed were reasonable and just, or compensatory or otherwise.

Third.

This defendant further says that said act of the Legislature is in violation of the constitutional laws of Kansas, in this: that it attempts to deprive the said defendant of its property without just compensation, by the pretended establishment of lower rates than are reasonable and just for the service required to be performed; that the charges made by said defendant to the said plaintiff for the service performed by it were reasonable and just, and were not in violation of any constitutional or lawful act of the Legislature of the State of Kansas, or any act of Congress passed in pursuance of the power of Congress to regulate commerce between the states.

Fourth.

For further answer, defendant denies each and every allegation, statement and averment in said amended petition contained.

Wherefore, this defendant prays judgment for costs.

B. P. WAGGENER,
BURNHAM & DASHIELL,
W. P. WAGGENER,
Attorneys for Defendant."

(Rec., pp. 14-15.)

To this answer a general denial was filed.

On May 14th, 1908, the Missouri Pacific Railway Company filed its motion for judgment (Rec., p. 39), as follows, *viz.:*

"MOTION FOR JUDGMENT ON PLEADINGS.

Defendant moves for judgment on the pleadings because the said act of the Legislature upon which said action is founded is void, as being in violation of and in conflict with the Fourteenth Amendment to the Constitution of the United States."

Which was overruled, the Railway Company excepting. (Rec., pp. 39-40.)

After the introduction of evidence the trial court made the following finding (Rec., p. 77), *viz.:*

"The Court: On consideration, I find against the defendant, and in favor of the plaintiff, for the sum of five hundred dollars and the costs of this action."

And on such finding entered judgment in favor of plaintiff and against the defendant Railway Company for five hundred dollars, with interest at the rate of 6 per cent from the 15th day of May, 1908,

and costs. From this judgment an appeal was taken to the Supreme Court of the State of Kansas, which court affirmed the judgment of the court below, and filed its opinion on the 9th day of April, 1910 (Rec., pp. 82-87), and this proceeding in error has been instituted to review the decision and judgment of the Supreme Court of the State of Kansas.

ASSIGNMENT OF ERRORS.

First.

The Supreme Court of Kansas erred in deciding and holding that Chapter 353, Laws of Kansas, 1905, being an act entitled "An Act to establish maximum rates for the transportation of crude oil, and the products thereof, to forbid rebates, and providing penalties for the violation thereof," was valid and operative, and that it did not conflict with the Constitution of the United States.

Second.

The said Supreme Court of Kansas erred in refusing to hold and decide that the said act of the Legislature of the State of Kansas, in its enforcement in this action, deprived the said Railway Company of the equal protection of the laws, and deprived it of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

Third.

The said Supreme Court of Kansas erred in holding and deciding that said act of the Legislature, to-wit, Chapter 353, Laws of Kansas, 1905, did not deprive said Railway Company of the guarantees of the Federal Constitution, and, in its enforcement,

operation and effect, did not deprive the said Railway Company of its property without compensation, and without due process of law.

Fourth.

The said Supreme Court of Kansas erred in holding and deciding that the maximum rates prescribed by said Chapter 353, Laws of Kansas, 1905, for the transportation of crude oil, and the products thereof, were not confiscatory, and that compliance with said act by the said Railway Company did not deprive it of its property without compensation, without due process of law, and did not deny to it the equal protection of the law.

Fifth.

Said Supreme Court of Kansas erred in holding and deciding that said act of the Legislature of the State of Kansas was not class legislation, and in refusing to hold that it discriminated against railway companies, and in favor of pipe line companies, as provided by Chapter 315, Laws of Kansas, 1905.

Sixth.

Said Supreme Court of Kansas erred in holding and deciding that the Legislature of the state had the lawful right to, and in so doing did not violate or infringe upon any of the inhibitions of the Federal Constitution, legislate specially as to the transportation of crude oil, and the products thereof, and that in so doing it had not discriminated in favor of

such commodity, to the great detriment and damage of the Railway Company, the appellant herein.

Seventh.

Said Supreme Court of Kansas erred in holding and deciding that, on the evidence disclosed by the record, the maximum rates prescribed by said statute were compensatory, and the enforcement of the same, under the circumstances as disclosed by the record, did not conflict with any of the rights guaranteed to the appellant by the Constitution of the United States.

BRIEF AND ARGUMENT.

FIRST.

Chapter 353, Laws 1905, entitled: "An Act to Establish Maximum Rates for the Transportation of Crude Oil and the Products Thereof, to Forbid Rebates, and Provide Penalties for the Violation Thereof," is, on its face, in conflict with the Constitution of the United States, and denies the railway companies the equal protection of the law.

The act provides (Section 2, Chapter 353):

> "Every common carrier which shall fail or refuse to accept for shipment, or to properly ship or deliver, the products named in Section 1 hereof, or which shall demand, exact or receive for such transportation or delivery any sum in excess of the rates herein made lawful, shall be liable to any person injured thereby in the sum of five hundred dollars, as liquidated damages, to be recovered by action in any court of competent jurisdiction, together with a reasonable attorney's fee, to be fixed by the court."

Under the provisions of this statute, the reasonableness of the statutory rate cannot be questioned in any tribunal by the Railway Company until it is called to account in a proceeding instituted against it for a violation of the act. The Supreme Court of Kansas, in construing the statute, said (Rec., p. 85):

> "The act in question merely proceeds upon the basis that, in the judgment of the Legislature, the maximum rates established are reasonable. *Prima facie*, this conclusion is correct, but there is no intimation that a judicial investigation of the fact of reasonableness is foreclosed, and *such an investigation may be made in any proceeding in which a carrier is called to account under the act.* * * * The right to a judicial determination of the question of reasonableness, however, is the matter of essence and substance, and not the matter of procedure; *and so long as the defendant cannot be made to suffer until a competent court has passed upon the justice of the legislative rates, the guarantees of the Federal Constitution are not infringed.*"

When the Railroad Company is called to account for a violation of the law, it may *then*, and not until then, question the rates. The Supreme Court of Kansas has so construed the statute.

> *C., M. & St. P. R. R. Co.* v. *Minn.*, 134 U. S. 418-458.

It will be observed that violation of this section of the act is not made a misdemeanor, and no public officer is charged with its enforcement; and therefore the unreasonableness of the rates cannot be tested or questioned in a comprehensive bill in equity. The Railroad Company can initiate no affirmative action. The shipper may to recover the statutory penalty. In such an action, either party may demand a jury. One jury in one action might find that the rates fixed by the statute were unreasonable and confiscatory, and in that action, as

against the one shipper, the company would be relieved of the penalty. The jury in another case, brought by another shipper, might find that the statutory rates were reasonable, and the company compelled to pay the penalty for its temerity in attempting to test the validity of the law.

In this case, if this Court should reverse the judgment because the statutory rates were unreasonable and confiscatory, as shown *by the evidence*, it would settle nothing but this controversy between the Railroad Company and Mr. Tucker. The final judgment would not be *res adjudicata* as against any other shipper seeking to collect the penalty for a violation of the statute. We contend that this statute is void on its face, within the principle announced by this Court in the case of *Ex parte* Young, 209 U. S. 146, in which the Court said that:

> "The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or federal) for the purpose of testing its validity. * * *
>
> If the law be such as to make the decision of the Legislature or of a commission conclusive as to the sufficiency of the rates, this Court has held such a law to be unconstitutional. *Chicago Ry.* v. *Minn.*, 134 U. S. 418. A law which indirectly accomplished a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result

is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity, without subjecting himself to the penalties for disobedience provided by the statute, in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the Legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates, as provided by the acts, are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the Legislature is complete in any event.

We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing

> such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the law themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates. * * *
>
> It has been suggested that the proper way to test the constitutionality of the act is to disobey it at least once, after which the company might obey the act, pending subsequent proceedings to test its validity. But in the event of a single violation, the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid, the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery."

The Supreme Court of Kansas suggests that the proper way to test the constitutionality of the statutory rate is in the proceeding "in which the carrier is called to account" for a violation of the act. The state court attempts to differentiate the case of *Ex parte* Young, 209 U. S. 123, *supra*, from the case under consideration, upon the *sole* ground that the penalty imposed by the Kansas statute is mild when compared with the penalties prescribed by the Minnesota statute. The court said (Rec., p. 86):

> "Compared with the drastic penalties prescribed by the Legislature of the State of Minnesota, those of the Kansas statute are mild indeed. The latter are not imposed upon officers, agents or employes. They affect the corporation

only, are merely pecuniary, and are neither extravagant nor unreasonable. Therefore the court holds they are not so enormous that their natural effect would be to deter carriers from resorting to the courts to test the validity of the act."

The court proceeds upon the theory that the penalty prescribed by the act is "not so enormous that their natural effect would be to deter carriers from resorting to the courts to test the validity of the act," but precedes this conclusion with the statement that the *only* remedy the carrier has to test the validity of the act is provided in the proceeding instituted by the shipper, "when the carrier is called to account under the act." Is such a remedy due process of law? It denies to the carrier the equal protection of the law, because it cannot go into court and challenge the validity of the law upon the same terms or upon equal terms with the shipper who is seeking its enforcement. The shipper alone initiates the proceeding, based upon a violation of the act by the carrier. The shipper has everything to gain and nothing to lose. The carrier has everything to lose and nothing to gain, except immunity from the payment of the penalty to that particular shipper. It is no exaggeration to say that oil shipments over lines of the Missouri Pacific Railway Company affected and controlled by the act in question will exceed ten thousand annually. To violate the requirements of the act as to each shipment would cost the carrier over $5,000,000.00, plus attorney's fees, if unsuccessful in defending each suit, to recover the statutory penalty; and yet the Supreme Court of Kansas concludes that the penalty is not "imposed upon officers, agents or

employes; they affect the corporation only, *are merely pecuniary*, and are neither extravagant nor unreasonable."

In the recent case of *Mo. Pac. Ry. Co.* v. *Nebraska*, 217 U. S. 207, this Court had under consideration the validity of a statute which required a railroad company to construct tracks to an elevator, upon demand of the owner, and which statute did not in terms provide a remedy to test the reasonableness of the demand before incurring the risk of paying a fine of five hundred dollars for refusal to comply with the demand. This Court, in holding the statute unconstitutional and void, said:

> "This statute has no reference to special circumstances. It is universal in terms. If we were to take it literally, it makes the demand of the Elevator Company conclusive, without regard to special needs, and, possibly, without regard to place. It is true that in the first of the present cases the Supreme Court of Nebraska discussed the circumstances and expressed the opinion that the demand was reasonable, and that building the side track would not cast an undue burden upon the road; and, in the second, it somewhat less definitely indicated a similar opinion. So it may be, although it hardly seems possible, that the sweeping words of the statute would be construed as, by implication, confining their requirements to reasonable demands. On the face of it, the statute seems to require the railroad to pay for side tracks, whether reasonable or not, or, if another form of expression be preferred, to declare that a demand for a side track to an elevator anywhere is reasonable, and that the railroads must pay. Clearly no such obligation is incident to their public duty, and to impose it goes beyond the limit of the police power.

But if the statute is to be stretched, or rather shrunk, to such demands as ultimately may be held reasonable by the state court, still it requires too much. Why should the railroads pay for what, after all, are private connections? We see no reason. And, moreover, even on this strained construction, they refrain from paying at the peril of a fine, if they turn out wrong in their guess that in the particular case the court will hold the demand not authorized by the act. If the statute makes the mere demand conclusive, it plainly cannot be upheld. If it requires a side track only when the demand is reasonable, then the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the act. Sometimes when summary action is necessary the property owner's rights are preserved by leaving all questions open in a subsequent suit. *North American Storage Co.* v. *Chicago*, 211 U. S. 306. But in such cases the risk is thrown on the destroyer of property. In this case there is no emergency, yet at the best the owner of the property, if it has any remedy at all, acts at its risk, not merely of being compelled to pay both the expense of building and the costs of suit, but also of incurring a fine of at least five hundred dollars for its offense in awaiting the result of a hearing. See *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 418. An earlier statute authorizing the State Board of Transportation, after hearing, to require the railroad to permit the erection of an elevator upon its roadbed already has been held bad. *Missouri Pac. Ry. Co.* v. *Nebraska*, 164 U. S. 403. See also *Hartford Fire Ins. Co.* v. *C., M. & St. P. Ry. Co.*, 175 U. S. 91-99. We are of the opinion that this statute is unconstitutional in its application to the present case, because it does not provide indemnity for what it requires."

The statute of Kansas, fixing maximum oil rates, is far more drastic, arbitrary and unreasonable than the statute of Nebraska, declared unconstitutional and void. As is well known, Kansas is producing annually large quantities of oil, and this act, with its penalties, applies to every shipment. The railroad companies have no means of having the schedule of rates prescribed investigated, and readjusted, if unreasonable and confiscatory. The Supreme Court of Kansas, however, says that "so long as the defendant cannot be made to suffer until a competent court has passed upon the justice of the legislative rates, the guarantees of the Federal Constitution are not infringed," overlooking the fact that, if the statutory rates are confiscatory, the railroad company has no remedy, except to violate the law and take the risk of paying heavy penalties.

The concurring opinion of Mr. Justice Miller, in *C., M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 460, is most pertinent here. Among other things, he said:

> "That the proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature or by its commission is by a bill in chancery asserting its unreasonable character, and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates, as being within the limits of a just compensation for the service rendered.
>
> That until this is done it is not competent for each individual having dealings with the carrying corporation or for the corporation with regard to each individual who demands its serv-

ices to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method."

The remedy suggested by the Supreme Court of Kansas does not afford the least semblance of due process of law. As said by this Court (*Ex parte* Young, 209 U. S. 146, *supra*):

> "To impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given), only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid.
>
> The observations upon a similar question made by Mr. Justice Brewer in *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 79-99, 100, 102, are very apt. At page 100 he stated: 'Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss?' Again, at page 102, he says: 'It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute the question would be very different from that here presented. But when the Legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the

> courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.'" (*Ex parte* Young, 209 U. S. 146, *supra.*)

If the final judgment in one case, brought by one shipper, would determine the validity of the law as to all other shippers, the remedy suggested by the Supreme Court of Kansas might be held to be due process of law, but, while the Railway Company is testing the validity of the law as to one shipment, either the confiscatory rates are in force or enormous penalties are accruing against the carrier for non-observance of the statutory schedules. The remedy afforded must be adequate, or it is not due process of law, within the meaning of the constitutional guarantees.

In the case of *Smyth* v. *Ames*, 169 U. S. 466, it was said that:

> "The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

In the case of *Davidson* v. *New Orleans*, 96 U. S. 102, Mr. Justice Miller, speaking for the court, said:

> "It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace, 1866, there is placed in the Constitution of the United States a declaration that 'no state shall deprive any person of life, liberty or property without due process of law,' can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is affected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B, would, if effectual, deprive A of his property without due process of law within the meaning of the constitutional provision."

The construction placed upon the act in question by the Supreme Court of Kansas in effect closes all approach to the courts by the Railroad Company for relief from unreasonable and confiscatory legislative rates.

In the case of *Ex parte* Young, 209 U. S. 147, it

was said, approving *McGahey* v. *Virginia*, 135 U. S., 662-694, that to provide a remedy which is unreasonable, and which "remedy is so onerous and impracticable as to substantially give none at all, the law is invalid, although what is termed a remedy is in fact given. * * *" "A law which indirectly accomplishes a like result, by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered, or may be obtained, is unconstitutional."

> "It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."

SECOND.

The Act is class legislation of the rankest character, arbitrary and unreasonable, and denies to railroad companies the equal protection of the law.

At the same session of the Legislature the act in question was passed Chapter 315, Laws 1905, being "An Act relating to the transportation of

oil by means of pipe lines," was passed. By Section One of the act, pipe line companies are "declared to be common carriers." By Section Three a schedule of rates is prescribed, and it is provided by Section Four as follows:

> "The state board of railroad commissioners shall have the general supervision and control over all such persons, firms, associations, or corporations in the performance of said business, and shall prescribe reasonable rules for the conduct thereof, which rules, when prescribed and delivered in writing to any such person, firm, association or corporation, shall be printed and posted up in a convenient, accessible and conspicuous place at each office, station or place of business where such oil is received or delivered. The state board of railroad commissioners is hereby authorized to prescribe reasonable maximum rates, not exceeding the rates set forth in Section Three hereof, which shall be charged for the transportation of such oil, which rate shall be binding on every such person, firm, association or corporation after its publication in the official state paper; provided, the reasonableness of such rates may be tested by proceedings therefor in any court of competent jurisdiction in this state, and such court shall, upon hearing the same, make such order as shall be proper, and such order may be reviewed by the Supreme Court as other civil proceedings, regardless of sum or value involved; provided, before beginning such proceedings in court to test such matters, such persons, firm, association or corporation shall execute a bond to the state of Kansas in such reasonable sum as the judge of the court in which such matter is brought shall order, conditioned that the person, firm, association or corporation making such application will promptly pay to any shipper the differ-

ence between the rate received for transporting oil and the rate finally ordered by such court. When such maximum rates shall be fixed by the state board of railroad commissioners, the rates prescribed in Section Three of this act shall cease to be of force, and the rates so fixed by the state board of railroad commissioners shall govern, as in this section provided."

By this section the pipe line company, a common carrier, transporting oil, is given a specific and definite remedy to test the reasonableness of the prescribed statutory rate, which is denied to the railroad company, a common carrier, as to the schedule of rates fixed for it for the transportation of the same commodity, and, pending such proceedings by the pipe line company, the enforcement of the statutory rate is suspended. The Railroad Company, however, can secure no suspension of the statutory rate while it is testing the reasonableness of the rate in a personal action brought by the shipper against the Railroad Company to recover the statutory penalty for a violation of the act. Why such discrimination? Can there be found any good reason for it? Are pipe line companies, as common carriers of oil, entitled to more consideration, under the law, than railroad companies as common carriers of oil?

Under Chapter 278, Laws 1907, a maximum rate was fixed on wheat, corn, rye, oats, barley, millet seed, kaffir corn, and the products thereof, and alfalfa seed, but no provision was made for liquidated damages or other penalties to the shipper for its violation. The Board of Railroad Commissioners, at the session of 1905, was given power (Section 4, Chapter 340), "to supervise all railroad freight and

passenger schedules of rates, tariffs and classifications, etc.," theretofore *fixed by the railroad companies,* or prescribed by the board; but no power *to increase* the maximum rates for oil fixed by Chapter 353, Laws of 1905, under which this action is brought. Why this discrimination in favor of the oil shipper? Does not the decision of the Supreme Court of Kansas, in the case of *State* v. *Haun,* 61 Kan. 152-159, answer the question? In that case the court approved the decision of the Supreme Court of the United States in the case of *R. R. Co.* v. *Ellis,* 165 U. S. 150, in which it was said that:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification."

Was there any reason for the classification into single and double lines? Was there any reason for limiting the operation of the statute to such classification? In the Haun case, cited *supra,* this Court said: "A classification of the kind attempted makes a distinction between corporations identically alike in organization, capital and all other powers and privileges conferred by law. It is arbitrary and wanting in reason. The act in question is class legislation of the most pronounced character"; and the Court copied and approved the language of Judge Cooley, as follows:

"Everyone has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow.' This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments.

The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character and restricting their rights, privileges or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended, like the want of capacity in infants and insane persons; and if the Legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness'; and those who should claim a right to do

so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived."

And the Supreme Court of the United States, in the case of *Cotting* v. *K. C. Stock Yards Co.*, 183 U. S. 109, approved that decision of the Kansas court, and said that:

"So we have the clear declaration of the Supreme Court of Kansas that legislation by which one individual, or even one set of individuals, is selected from others doing the same business in the same way, and subjected to regulations not cast upon them, is a discrimination forbidden by the constitutional provision which obtains both in the Constitution of Kansas and in that of the United States, to the effect that the equal protection of the laws is guaranteed to all. May we not rightfully accept this declaration of law by the highest tribunal of the state by whose legislature the act in question was passed, and, accepting the reasoning of that decision, does it not follow that if an act which provides certain regulations for corporations employing ten or more laborers and leaving corporations employing less than that number free from such regulation is an unjust discrimination and a denial of the equal protection of the laws —an act which imposes regulations upon corporations and leaving all corporations doing a like business less than that amount free from such regulations, is equally obnoxious to constitutional prohibition?"

A statute which places upon a person within the jurisdiction of the state arbitrary burdens not placed upon other persons doing the same kind of business,

under the same circumstances, denies to the persons upon whom it is placed the full protection of the laws.

Raymond v. *Chicago, etc.*, 207 U. S. 35.
Connally v. *Union Sewer, etc.*, 184 U. S. 558.
Cook v. *Marshall Co.*, 196 U. S. 274.
Cotting v. *K. C. Stock Yards Co.*, 183 U. S. 105.

The state Supreme Court admits (Rec., p. 85) that:

> "It is true that, under the pipe line act, the reasonableness of rates fixed by the Board of Railroad Commissioners may be tested once for all in an appropriate action against the board,"

but thereon concludes that:

> "So long as the defendant cannot be made to suffer until a competent court has passed upon the justice of the legislative rates, the guarantees of the Federal Constitution are not infringed."

Is there any reason for giving the pipe line carrier the right to test the reasonableness of its rates "once for all in an appropriate action against the board," and the railroad company carrier *only* the right to test the reasonableness of the rates in a "proceeding in which (such) carrier is called to account under the act"? The remedy afforded the pipe line carrier is adequate, just and fair, while that afforded the railroad company carrier is inadequate, unreasonable and arbitrary.

In the case of *Barbier* v. *Connally*, 113 U. S. 23-31, it was said:

> "The 14th Amendment, in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."
>
> *Gulf, Col. & Pac.* v. *Ellis*, 165 U. S. 150-159.
> *Magoun* v. *Ill. Trust Co.*, 170 U. S. 283.
> *Cotting* v. *Stock Yards*, 183 U. S. 108-112.
>
> "Equal protection of the laws means subjection to equal laws applying alike to all in the same situation."
>
> *Ry. Co.* v. *Greene*, 216 U. S. 400.

The statute on its face is discriminatory. It gives to the shipper who ships ten gallons of oil a right to recover five hundred dollars and attorneys'

fees as "liquidated damages," and a like sum as "liquidated damages" to the shipper of ten thousand gallons; and, while no attorney's fee was allowed in this action solely because there was no proof as to what would be a reasonable attorney's fee, nevertheless the statute provides for a "reasonable attorney's fee" *as a part of the penalty;* and doubtless the Supreme Court of Kansas would have approved it had it been allowed by the trial court, notwithstanding that court had decided, in the case of *Atkinson* v. *Woodmanse,* 68 Kan. 72-75 (following the decision of this Court in *Gulf, Colo. & C. R. R. Co.* v. *Ellis,* 165 U. S. 150-153), that a statute of similar import was unconstitutional and void. The state Supreme Court (Rec., p. 84) said:

> "It is also said that the statute discriminates between the defendant and other litigants in the matter of attorney's fees. There is nothing in the abstract to show that the plaintiff recovered attorney's fees, so that the defendant has nothing to complain about in that respect."

The court, however, overlooks the fact that, after the issues were joined in the District Court, the Railway Company filed a motion for judgment (Rec., p. 39) on the pleadings, *viz.:*

> "Defendant moves for judgment on the pleadings, because the said act of the Legislature upon which said action is founded is void, as being in violation of and in conflict with the 14th Amendment to the Constitution of the United States."

This was overruled. (Rec., pp. 39-40.) At the very threshold of the litigation the Railway Company raised the question of the constitutionality of the act, and, if the act is unconstitutional on its face because it includes attorney's fees as *part* of the statutory penalty, the fact that the plaintiff neglected to prove what would be a reasonable attorney's fee would not breathe vitality into an unconstitutional law.

THIRD.

The schedule of rates prescribed by Chapter 353, Laws of Kansas, 1905, as shown by the evidence, are unreasonable and confiscatory, and to enforce the same deprives the Railroad Company of its property without compensation, and without due process of law, and denies to it the equal protection of the law.

The trial court made no specific finding of fact, but, at the conclusion of the evidence (Rec., p. 77) stated that:

> "On consideration I find against the defendant, and in favor of the plaintiff, for the sum of five hundred dollars and the costs of this action."

The Supreme Court of Kansas refused to examine the evidence. It stated (Rec., p. 86):

> "It is not necessary to analyze the evidence."

Showing conclusively that the court was unwilling to give to the Railroad Company that fair consideration of the record which the importance of the questions involved demanded. The manner in which the defense of the Railroad Company was brushed aside by the court is, to say the least, a strong persuasive argument in support of our contention that the remedy suggested by the court to test the reasonableness of the rates is not adequate to protect the company, and is hardly consistent with the statement of the court that (Rec., p. 85) in the statute "there is no intimation that a *judicial* investigation of the fact of reasonableness of rates is foreclosed, and such investigation may be made in any proceeding in which the carrier is called to account under the act." Evidently the Kansas Supreme Court "did not analyze the evidence" or even read it, or it would not have made the statement (Rec., p. 86) that: "There is nothing in the evidence showing what would be a reasonable rate for the transportation of oil, or that the legislative rates are too low."

There was absolutely no conflict in the evidence, and it was shown without question (Rec., pp. 46-51) that the actual cost of handling and transporting the shipment of the oil in question *from Concordia to Cawker City* was $13.00—a distance of forty-seven miles. (Rec., p. 48.) The amount paid by Mr. Tucker was $15.02 (Rec., p. 42), which included advanced charges of $7.72 paid to the Santa Fe by the Missouri Pacific Railway Company, when it received the oil from the Santa Fe Company at Concordia. The statutory rate for the shipment from Concordia to Cawker City was $5.73 (Rec., p. 43),

and the charge that was made and collected for the transportation of the oil from Concordia to Cawker City was $7.30 (Rec., p. 43), or, according to the conceded and undisputed evidence, $5.70 *less* than what it *actually* cost to perform the service. If the statutory rate ($5.73) had been applied to the shipment, the *loss* to the Railway Company would have been $7.27. And yet, with this *conclusive* and *undisputed* showing in the record, the Supreme Court of Kansas states that "it is not necessary to analyze this evidence," as "there is nothing in the evidence showing that the legislative rates are too low." (Rec., p. 86.) It will be observed that this shipment is what is denominated a double line shipment, and the total distance shipped being 253 miles over the Santa Fe and 47 miles over the Missouri Pacific Railway. (Rec., p. 12.) The weight of the oil was 10,432 pounds, and, if the statutory rate were applied, the *total* charge for a distance of 300 miles for such service was $12.00, whereas it appears, without *conflict in the evidence*, that the minimum *actual* cost of the service for 47 miles (not including any fixed charges) was $13.00. The Legislature singled out oil from all other commodities and prescribed a schedule of maximum rates, *as to that commodity*, which, it is conceded—at least not disputed—are much less than the *actual* cost of the service; and the Supreme Court of Kansas holds that the Railway Company must, at such *actual* loss, perform the service or pay the penalty prescribed in the statute.

When applied to the Central Branch division of the Missouri Pacific Railway Company, over which this oil was transported (Rec., pp. 60-61), "the aver-

age cost per ton per mile of all intra-state freight is 1.654 cents, and when the fixed charges are added, the average cost is 2.098 cents, while the average revenue per ton per mile from all intra-state freight is 1.951 cents. The freight charges on a shipment of 25 barrels of fuel oil weighing 10,432 pounds, shipped from Humboldt, Kansas, to Cawker City, Kansas—a distance of 300 miles—at the maximum rate fixed by the Kansas statutes (11.5 cents per hundred pounds) would amount to $12.00, or to a rate of .767 cent per ton per mile for a double line shipment, while the average cost of handling *intra-state* freight is 1.654 cents per ton per mile, and when the fixed charges are added the cost is 2.098 cents." And when applied to all of the road in Kansas operated by the Missouri Pacific Railway Company (Rec., pp. 56-57), "the average cost per ton per mile of all intra-state freight is 1.271 cents, and when the fixed charges are added the average cost is 1.55 cents, while the average revenue per ton per mile from all intra-state freight is 1.331 cents. The freight charges on a shipment of 25 barrels of fuel oil weighing 10,432 pounds, shipped from Humboldt, Kansas, to Cawker City, Kansas—a distance of 300 miles—at the maximum rate fixed by the Kansas statute (1.15 cents per hundred pounds) would amount to $12.00, or to a rate of .767 cent per ton per mile for a double line shipment, while the average cost of handling intra-state freight is 1.271 cents per ton per mile, and, when the fixed charges are added, the cost is 1.555 cents."

The question, therefore, is squarely presented whether a common carrier can be compelled to per-

form a particular service for a shipper for *less* than what it actually cost to perform it. Is not the carrier entitled to *some* compensation for such service? Can a non-compensatory maximum rate be justified upon the theory that possibly the carrier is compensated for the loss in some other service?

In *Railroad Comm. Cases*, 116 U. S. 331, it was said that:

> "The power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

In the case of *Georgia R. R. Co., etc.*, v. *Smith*, 128 U. S. 179, it was said that:

> "The power of the state to prescribe the charges of a railroad company for the carrier of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting it with authority over those matters, was 'subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation; and that what is done does not amount to a regulation of foreign or interstate commerce.'"

In *C., M. & St. P. Ry.* v. *Minnesota,* 134 U. S. 418-458, it was said:

> "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States; and insofar as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

In *C. & G. T. Ry. Co.* v. *Wellman,* 143 U. S. 339-344, the court, in answer to the suggestion that the Legislature had no authority to prescribe maximum rates for railroad transportation, said that:

> "The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

In *Budd* v. *New York,* 143 U. S. 517, 547, the court, while sustaining the power of New York by statute to regulate charges to be exacted at grain elevators and warehouses in that state, took care to state, as a result of former decisions, that such power was not one "to destroy, or a power to compel the doing of the services without reward, or to take private property for public use without just compensation, or without due process of law."

In *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 399, which involved the validity of certain

rates for freight and passengers prescribed by a railroad commission established by an act of the Legislature of Texas, this Court, after referring to the above cases, said:

> "These cases all support the proposition that, while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power, and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole), operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that, under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally ac-

quired and legally held. It was, therefore, within the competency of the Circuit Court of the United States for the Western district of Texas, at the instance of the plaintiff, a citizen of another state, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was in so doing only exercising a power expressly named in the act creating the commission."

So, in *St. Louis & San Francisco R. R.* v. *Gill*, 156 U. S. 649, 657, it was said that:

"There is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws."

In *Covington & Lexington Turnpike Road Co.* v. *Sanford*, 164 U. S. 578, 584, 594-5, 597, which involved the validity of a state enactment prescribing rates of toll on a turnpike road, the court said:

"A statute which, by its necessary operation, compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair, and from earning any dividends whatever for stockholders, is as obnoxious to the Consti-

tution of the United States as would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect tolls for passengers and freight."

And in *C., B. & Q. R. R.* v. *Chicago*, 166 U. S. 226, 241, it was held that:

"A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

In the case of *Smyth* v. *Ames*, 169 U. S. 523, affirming the language of the court in *Railroad Comm. Cases*, cited *supra*, it was said:

"Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to the taking of private property for public use without just compensation, or without due process of law."

In the case of *Cotting* v. *K. C. Stock Yards Co.*, 183 U. S. 95, it was said that:

"The state's regulation of his charges is not to be measured by the aggregate of his profits, determined by the volume of the business, but by the question whether any particular charge

to an individual dealing with him is, considering the service rendered, an unreasonable exaction. In other words, if he has a thousand transactions a day, and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable, because by reason of the multitude the aggregate of his profits is large. The question is not how much he makes out of his volume of business, but whether, in each particular transaction, the charge is an unreasonable exaction for the services rendered. He has a right to do business. He has a right to charge for each separate service that which is reasonable compensation therefor, and the Legislature may not deny him such reasonable compensation, and may not interfere simply because, out of the multitude of his transactions, the amount of his transactions is large. Such was the rule of the common law, even in respect to those engaged in a quasi-public service, independent of legislative action. In any action to recover for an excessive charge, prior to all legislative action, who ever knew of an inquiry as to the amount of the total profits of the party making the charge? Was not the inquiry always limited to the particular charge, and whether that charge was an unreasonable exaction for the services rendered? As said by Mr. Justice Bradley, in *Trans. Co.* v. *Parkersburg*, 107 U. S. 691, 699:

'It is also obvious that since a wharf is property, and wharfage is a charge or rent for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than the cost of building and maintaining it, or what disposition he makes of such revenues, can in no way concern those who make use of the wharf, and are required to pay the regular charges therefor; provided, always, that the charges are reasonable and not exorbitant.'

In *Canada Southern Ry. Co.* v. *International Bridge Co.*, 8 Appeal Cases, 723-731, Lord Chancellor Selbourne thus expressed the decision of the House of Lords:

'It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to accompany being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable, with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made. One of their Lordships asks counsel at the bar to point out which of these charges was unreasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when examined with reference to the service rendered and the benefit to the person receiving that service, perfectly unexceptionable, according to any standard of reasonableness which can be suggested. That being so, it seems to their Lordships that it would be a very extraordinary thing indeed, unless the Legislature had expressly said so, to hold that the person using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which, from natural and

other causes, every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned judge in the court below, the case of Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount at the utmost to fifteen per cent. Their Lordships can hardly characterize that argument as anything less than preposterous.'

The authority of the legislature to interfere by a regulation of rates is not an authority to destroy the principles of these decisions, but simply to enforce them. Its prescription of rates is *prima facie* evidence of their reasonableness. In other words, it is a legislative declaration that such charges are reasonable compensation for the services rendered, but it does not follow therefrom that the legislature has power to reduce any reasonable charges, because, by reason of the volume of business done by the party, he is making more profit than others in the same or other business. The question is always not what does he make, as the aggregate of his profits, but what is the value of the services which he renders to the one seeking and receiving such services."

In the case of *R. R. Co.* v. *Phil. Co.*, 68 Atl. Reptr. 679, the Supreme Court of Pennsylvania, considering the two-cent passenger rate of that state, said that:

"If part is unprofitable, it is neither good business nor justice to make it more so, because the loss can be offset by profit on the rest. To concede that principle would, as the court below indicated, permit the legislature to compel the carriage of passengers practically for nothing,

> though the inexorable result would be that freight must pay inequitable rates that passenger travel may be cheap. The corporation is entitled to make a fair profit on every branch of its business, subject to the limitation that its corporate duties must be performed, even though at a loss."

That a railroad company is entitled to reasonable compensation for a separate service is settled by the recent decision of this Court in *Southern Ry. Co.* v. *St. Louis Hay Co.*, 214 U. S. 297, in which it was said that:

> "A carrier which is at service and expense in stopping goods in transit for inspection and reloading for the benefit of the shipper is entitled to compensation in addition to the actual expense incurred."
>
> *Inter. Comm. Com.* v. *C., B. & Q.*, 186 U. S. 320.
>
> *Inter. Comm. Com.* v. *Stickney*, 215 U. S. 98-104.

The Legislature, by the passage of Chapter 353, Laws of 1905, has separated the oil rates from all other rates, and fixed a schedule of maximum rates for oil, and the rates thus prescribed must stand or fall, independent of all other rates. However, can it be successfully contended that any rate for any service which does not provide sufficient revenue to pay the *actual* cost of the service is reasonable and just? Has any shipper the right to demand that a carrier shall perform for him a service at less than the actual cost of such service to the carrier? Has the Legislature the constitutional right to single out one com-

modity to be transported for less than the cost of such service to the carrier? If Chapter 353, Laws of 1905, is a valid exercise of legislative power, then the Legislature may, by special act, compel the transportation of wheat or corn or live stock at *less* than the cost of the service. Is not such legislation a deprivation to the company of its property without compensation, and without due process of law? Does it not deny to the Railway Company the equal protection of the law?

But there is another phase of the controversy, which would have been apparent to the state Supreme Court had it taken the trouble to "analyze this evidence." It is shown by "Exhibit C" (Rec., pp. 54-55) that the total business of the Missouri Pacific Railway Company on all of its lines in Kansas, including *intrastate* and *interstate*, for the six months ending December 31st, 1907, resulted in an actual deficit of $233,559.98, in operating, taxes and fixed charges, and no provision made for any dividend on the stock. The earnings for the same period on intrastate freight, based on the actual business for July and August, 1907, were $614,255.02 (Rec., p. 56), and the operating expenses were $586,679.08—leaving a net of $27,575.94 with which to pay taxes, interest, etc., of $128,642.80—leaving a net deficit of $101,-066.86. The bonded indebtedness did not exceed $16,000 per mile, so the claim cannot be made that there was a fixed or interest charge on "watered bonds"; and there was no pretense that any attempt was made to pay dividends on stock.

With evidence on this subject *in no manner contradicted*, the Supreme Court of Kansas says that:

"The figures to the effect that the Missouri Pacific Railway Company loses money every year on its Kansas business do not *tend* to show either of these facts." (Rec., p. 86.) The evidence not only shows conclusively that the statutory oil rates were confiscatory, but the manner in which the Supreme Court treated the evidence demonstrates that a "judicial investigation of the fact of reasonableness" of the statutory rate *"is foreclosed,"* and such investigation cannot be had "in any proceeding in which the carrier is called to account under the act."

The following testimony of S. E. Sawyer will illustrate the absurdity of submitting the question of the reasonableness of the rates to an ordinary jury:

"Q. State your name. A. A. E. Sawyer.

Q. Where do you live? A. St. Louis, Missouri.

Q. What business are you in? A. I am employed by the Missouri Pacific Railway Company, in the accounting department.

Q. As such clerk in such accounting department, do you have control and possession of the records, weigh bills, bills of lading, and records of that character, showing the transportation of freight and passengers, and the expense in connection? A. I have access to them.

Q. Kept in that building? A. Yes, sir.

Q. 'Long about January first, were you instructed, with other accountants, to prepare statistics of the earnings and expenses and operations of the Missouri Pacific Railway Company in Kansas? A. Yes, sir.

Q. When did that work begin? A. About the 3rd of January, and lasted until January, 1908.

Q. How many persons were there employed? A. They started with forty, but sometimes nearly every man in the house was employed.

Q. In the preparation of these statistics which you have here, how many way bills did you necessarily examine? Approximately? A. For the interstate business, I would say about twenty thousand.

Q. And for the intrastate? A. I would say about twenty thousand more.

Q. What was the character of the books you had to examine? A. Well, there were books that were made from way bills, in volumes and sized. That was the character of each book.

Q. Have you figured about how long it would take to go through and examine, yourself, and arrive at the results you have? A. I would take about thirteen or fourteen years, if not more.

Q. I will ask you to examine 'C,' consisting of pages 1, 2 and 3, and state what that paper is. A. It is a statement of total earnings and expenses, state of Kansas, for six months ending December 31st, 1907.

Q. Now state to the Court, whether or not, that paper is an absolutely correct statement of the receipts, statements and disbursements for the period of time? If so, state it? A. It is correct, to the best of my knowledge and belief."

Attention is called to the concluding part of the opinion of the state Supreme Court (Rec., p. 87), to-wit:

> "The trial court was correct in holding that the defendant's evidence was not sufficient to prove that the statutory rate is unjustifiably low."

There is not a thing in the record upon which to base this statement, except what may be inferred from the *mere* fact that the trial court rendered a judgment against the Railway Company for the statutory penalty. Furthermore, the court states (Rec., p. 86) that:

"It is not necessary to analyze the evidence."

It is difficult to understand how the state Supreme Court could reach the conclusion that the evidence did not *tend* to show that the statutory oil rates "are too low," when it admits that "it is not necessary to analyze this evidence." If the Court refuses to "analyze this evidence," what would a jury do with it?

We respectfully submit that, in any view of the case, Chapter 353, Laws of 1905, is unconstitutional and void, and should be so declared.

BALIE P. WAGGENER,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

JOHN W. TUCKER, *Defendant in Error.*

No. 545 (22,159).

In Error to the Supreme Court of the State of Kansas.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

May it Please the Court:

In the present case the facts are, briefly, that in December, 1906, defendant in error received a freight shipment of refined distillate oil, a product of crude petroleum, contained in twenty-five barrels, all of the gross weight of 10,432 pounds, over the railroad line of defendant in error, the haul on that line being from Concordia, Kan., to Cawker City, Kan., a distance of some 47 miles, the shipment having originated at Humboldt, Kan.; thence carried to Concordia over the railway line of the Atchison, Topeka & Santa Fe Railway Company, a distance of some 230 miles, or a trifle less, being thus a double line shipment, the haul over the line of defendant in error being thus about one-fifth of

the entire haul. Plaintiff in error collected the freight charges of both roads, that of the Santa Fe being $7.72, and that of plaintiff in error $7.30, a total charge of $15.02. (Rec. 80, 81.)

The rate according to the schedule of the maximum freight law (Kan. Laws, 1905, ch. 353) would have been about $12 (rec. 81), the excess being wholly in the charge made by the plaintiff in error, there being no complaint in the charge of the Santa Fe. The share of plaintiff in error, according to the relative distances of shipment, should hardly have exceeded one-third of the entire amount in fact, the shipment over its line as we have shown not exceeding one-fifth of the entire distance by direct line, at the single line statutory rate, the charge from Concordia to Cawker City being $5.73. (Rec. 82.)

After the introduction of defendant's evidence, plaintiff introduced evidence showing shipment by freight to one W. Berger over the line of plaintiff in error (defendant below) from Concordia, originating at Chanute, Kan., to Osborne, Kan., a noncompetitive point, eighteen miles beyond Cawker City, of products of crude petroleum, at a uniform rate of four and one-half cents per hundred pounds, about twenty-five per cent lower in rate than the statutory rate—one shipment being of five barrels of oil, another of three barrels of gasoline, the third of four barrels of gasoline. (Rec. 127-129.)

BRIEF AND ARGUMENT.

Instead of in the first instance considering the questions which involve the validity of the statute on constitutional grounds, as it is a principle of universal acceptance that a statute will not be declared repugnant to the constitution, except where that question is indispensable to decision, we will depart from the order observed in the brief of plaintiff in error, and as well that followed in the Kansas supreme court by defendant in error, and at once direct attention to the features which we claim are determinative, without recourse to constitutional questions, and by which, as we urge, plaintiff in error is foreclosed from invoking examination of constitutional questions.

The latest writer on constitutional law says (1 Willoughby, Const. Law, 14) that the principle that the court will not pass adversely upon the validity of an act of congress (and an act of a state legislature within its province is subject to like rules, id., 23), unless it is absolutely necessary for it to do so in order to decide the question at issue, has been so often declared that citation of authorities is not necessary.

There are three reasons disclosed by the record rendering examination of constitutional questions in this case unnecessary. One, as to the question of good faith in the make-up of the statements relied upon by plaintiff in error, and urged as disclosing the prescribed rate to be confiscatory. This will be reserved until discussion of the statements and supporting testimony to be made hereafter. The other two rest upon (1) the total lack of showing that there was any change of rate in the legislation attacked, and (2) that it appears that plaintiff in error is estopped from complaining of the act by reason of having voluntarily made a lower rate to another shipper, at twenty-five per cent below the statutory rate.

(1) NO CHANGE OF RATE IS SHOWN.

Nowhere in the record can be found a scintilla of evidence that chapter 353 of the Kansas Laws of 1905 lowered the rate which had theretofore been exacted of shippers by plaintiff in error or any other railroad in that state. Plaintiff in error could be deprived of nothing unless the rate prescribed by the act had the effect of depriving it of revenue, by making a rate less than it had obtained prior to the enactment of the statute. There can be no question of governmental confiscation, and consequently neither invidious segregation nor deprivation of property at all, to say nothing of deprivation of property without due process of law in contravention of the guaranties and inhibitions of the fourteenth amendment, unless such be shown by clear proof.

The only evidence bearing on the question in any way, besides the Berger shipments hereinafter discussed, creates a reasonable and fair inference that there was no change made by the schedule, that evidence being the "Rate per Ton per Mile on Oil Provided for by Joint Freight Tariff No. 8-2586A" (exhibit D, rec. 104), which is barely mentioned by one witness (rec. 122) and none other. In fine, there is nothing dependable in the record on which could be predicated any accurate or approximately correct estimate of this act upon oil shipment schedules. The cost of its transport is not shown at all. There is no change of rates shown, the only evidence in that respect being Freight Tariff No. 8, which indicates there has been no change in rates under the act (rec. 104), as that schedule will on comparison be found to correspond exactly with the schedule prescribed in the act, except that the exhibit introduced by plaintiff in error states a ton mile rate, which is not given in the act. The heading of the exhibit, "Rate per Ton per Mile on Oil, Provided for by the Joint Freight Tariff No. 8-2686A," does not indicate the legislative prescription, but an agreed tariff promulgated by the rail-

ways themselves. Whether the act copied this schedule, or the schedule copied the act, or the legislature by accident fixed on the identical rates prescribed by plaintiff in error itself, we have no means of knowing, and the record is otherwise entirely silent on the subject. Unless the contrary be shown, according to a familiar principle, continuance of the rates will be presumed.

9 Enc. of Evidence, 906 *et seq.*

No change being shown, it must be presumed that the same rate was in existence when the act was passed, under the principle cited. The evidence wholly failing to show any change of rates, it can not be said that the act deprived plaintiff in error of anything. The act can not be declared unconstitutional because of any deprivation of property, on account of any showing made by this evidence. The burden is on plaintiff in error to show, not only deprivation, but also that there was a change in rates to an appreciable degree—one which would have a substantial effect upon net income. The record contains nothing on which could be based any estimate of the effect upon net income of plaintiff in error consequent upon the passage of the act complained of. A difference of a few cents or a few dollars, even if such were shown, would not suffice. *De minibus non curat lex.*

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 680.

State v. A. C. L. R. Co., (Fla.) 37 So. 314.

Atl. C. L. Co. v. Florida, 203 U. S. 256.

Dow v. Biedleman, 49 Ark. 5, S. W. 297.

S. C. (affirmed) 125 U. S. 680.

State v. Adams Exp. Co., (Neb.) 122 N. W. 691.

R. R. Com. v. Cen. of Ga. R. Co., 170 Fed., (C. C. A.) 225.

Reversing S. C., 161 Fed. 925.

Mo. Pac. R. Co. v. Smith, 60 Ark. 221.

State, *ex rel.*, v. N. P. R. Co., (N. D.) 120 N. W. 869.

See S. C. 25, L. R. A. n. s. 1001, and note.

S. C. affirmed *sub nom.* N. P. R. Co. v. North Dakota, 216 U. S. 597.

When it is sought to challenge a newly established rate upon a single article of transport upon constitutional grounds, the evidence adduced by the railway company must be sufficient to warrant the conviction that the rate is confiscatory in character. It must be shown how much the change will affect the income, and how much the rate has been changed. Mr. Justice Brewer says:

"It is enough for the present to hold that there is in the record nothing from which a reasonable deduction can be made as to the cost of transportation, the amount of phosphates transported, or the effect which the rate established by the commission will have upon the income. Under these circumstances it is impossible to hold that there was error in the conclusions reached by the supreme court of the state of Florida."

Atlantic Coast Line R. Co. v. Florida, 203 U. S. 256.

If, as is fairly to be inferred from the evidence, the statute made no change in the rate, the road by its former acquiescence can not be heard to raise the question of unreasonableness.

Telegraph Company v. Richmond, (U. S.) 32 Sup. Ct. 449.

Plaintiff in error could be deprived of nothing by virtue of this statute, unless the statute attempted to compel shipment at a rate less than plaintiff in error had established at and before the passage of the act. The purpose of the act is not so much to secure low rates as to secure equal rates. The penalties are directed not alone against the exaction of a higher rate than that prescribed, but against discrimination as well. As an instance of discrimination, although there claimed to have been unwittingly accepted (of which some may be excused for doubting), the case of Standard Oil Company v. United States, 90 C. C. A. 364, is instructive, in which, from the statements of Circuit Judge Grosscup, who delivered the opinion, it appears that to the shipper of petroleum who had practically killed off all competition by similar methods a com-

modity rate was given by the Chicago & Alton Railroad Company of six cents per hundred pounds, while to a competitive shipper (as the doubting Thomases claim good reason for believing) who made application for rates a rate was shown called a class rate of eighteen cents per hundred pounds on the same trip and route from Whiting, Ind., to East St. Louis, Ill., a distance of about 280 miles. Would it have been depriving the Chicago & Alton road of its property had Congress or the Interstate Commerce Commission established a rate to all of six cents from Whiting to East St. Louis? A common carrier was at common law, and still is, required to give like service to all for equivalent charges. The concurring opinion of Judge Baker in the case last cited contains some interesting information concerning the *modus operandi* and effect of discrimination, at page 379 *et seq.*

Here there is no evidence whatever that plaintiff in error or any other carrier in the state of Kansas, prior to the enactment of this statute, charged any shipper one cent over the rate so legislatively prescribed.

(2) PLAINTIFF IN ERROR IS ESTOPPED FROM COMPLAINING THAT THE RATE IS UNREASONABLE, BY ITS OWN ACTS.

Notwithstanding the "fearful penalties" of which counsel speaks with such concern, the record in the case reveals that three shipments of the products of petroleum were made over the same line to a noncompetitive point eighteen miles beyond Cawker City, at far less than the statutory rate would have been to Cawker City, as is disclosed by the expense bills, on pages 127 to 129 of the record. This rate made upon three shipments, at different times about the same time as the shipment to defendant in error, were given to some shipper at Chanute, Kan., the rate on the double line shipment from Concordia to Osborne, voluntarily, so far as appears, and as must be presumed, being 4½ cents per hundred pounds. Apparently there is another fly in the ointment since the passage of this act.

Some shipper is obtaining a lower rate than the statutory rate over the line of plaintiff in error. Knowing this, as this record convinces us, are we not at once inoculated with a suspicion that the small showing as to oil shipments in the statements relied on by plaintiff in error (rec. 103, 107), if not on other commodities, may be referred to shipments by favored shippers at less than the statutory rate? Assuredly there is cogent reason for the suspicion expressed by the supreme court of Kansas that the showing made by plaintiff in error *is not made in good faith.*

These Berger shipments were made over the same Central Branch line operated by plaintiff in error to Osborne, eighteen miles beyond Cawker City, at less than the statutory rate, therefore less than the rate fixed by Joint Tariff No. 8. (Rec. 104.) These shipments were all small consignments (rec. 127-129) of products of crude petroleum, disclosing no feature of consideration over the shipment to defendant in error upon which could be based a reason for differentiation.

It has often been said that "common carrier," *ex vi termini,* negatives the possibility of a right to discrimination. The highest authority of text and decision, as well as legislative enactments, declare against it. Discrimination was against both spirit and letter of the common law. Mr. Chief Justice Waite, in Munn v. Illinois, 94 U. S. 113, quotes from Sir Matthew Hale's De Jure Maris, 1 Harg. L. Tr. 6, to the affect that a public ferry "Doth in consequence tend to become a common charge, and is become a thing of public interest and use, and every man for his personal passage pays a toll, which is a common charge."

A leading case on the subject of discrimination by common carriers is L. E. & S. L. Cons. R. Co. v. Wilson, (Ind.) 18 L. R. A. 105, in a note to which will be found collated the most noted cases in which the doctrine as applicable here is laid down.

See, also, 5 A. & E. Encycl. of L. (2d ed.) 177.

D. & N. O. R. Co. v. A. T & S. F. R. Co., 15 Fed. 650, and the cases there cited.

In making the shipments at a lesser rate than that prescribed plaintiff in error violated fundamental rights of shippers All must receive from common carriers like service for like compensation. The repetition shows an understood arrangement, in fact the making of a voluntary rate below the schedule lawfully fixed; as, if a man should fall out of a window, that would be an accident; if he fell out of the same window the following day, that might be a coincidence; but if he falls out of the same window the third successive day, that is a habit. Can the shipper from Chanute be favored over the shipper from Humboldt, ten miles nearer on the same railway line? The authorities above cited return an emphatic "No" to that query. Under such conditions a common carrier can not be heard to claim for one a right or rate which it does not extend to all. When a rate is shown to be voluntarily made by a common carrier, it can not be heard to say that a higher rate is confiscatory, nor question its constitutionality.

The state may, so far as either the federal or state constitution is concerned, establish a flat rate to all shippers, when favored shippers are given that rate, under a fraudulent guise or otherwise. Mr. Justice Brewer says:

"It (the state) is not bound to inquire whether it furnishes adequate return to the railroad company, for *the state may insist upon equality*, to be enforced under the same conditions against all who perform public or quasi-public service. When, voluntarily, the Vicksburg company established a local rate of 3½ cents from Vicksburg to Meridian for those who had, within 90 days, made a shipment over the Shreveport road, *it estopped itself from complaining* of an order making that rate applicable to all shipments, no matter whence they arose, and in favor of all merchants, whether those transporting over the Shreveport road or not. . . . Even if a state may not compel a railroad company to do business at a loss, and conced-

ing that a railroad company may insist, as against the power of the state, upon the right to establish such rates as will afford a reasonable compensation for the service rendered, yet when it voluntarily establishes local rates for some shippers it can not resist the power of the state *to enforce the same rate for all.* . . . The state may insist upon equality as between all its citizens."

Ala. & V. R. Co. v. R. R. Com. of Miss., 203 U. S. 496.

The same principle applied in another direction was again applied by the same jurist in Seaboard Air Line Co. v. Florida, 203 U. S. 261.

In Reagan v. Farmer's Loan & Trust Co., 154 U. S. 362, *loc. cit.* 412, this court, in noting the fact that there were exceptions to the general rule that railroads may resist noncompensatory schedules, include in those exceptions unjust discrimination as between individual shippers.

When plaintiff in error made a voluntary rate of 4½ cents per hundred pounds for the transportation of products of petroleum from Concordia to Osborne upon a double line shipment from Chanute via the Santa Fe Route, it estopped itself from claiming that the higher statutory rate for the shipment from Concordia to Cawker City, eighteen miles nearer Concordia than was Osborne, under the same conditions, upon a double line shipment from Humboldt, ten miles nearer Concordia than was Chanute, via the same Santa Fe Route, is confiscatory or unreasonable.

Of the geographical particulars, judicial notice will be taken.

K. C. S. F. & G. R. Co. v. Burge, 40 Kan. 736.

Bartholomew v. First National Bank, 18 Wash. 683.

Harvey v. Territory, 11 Okla. 156.

Pearce v. Langfit, 101 Pa. St. —, 47 Am. R. 737, 16 Cyc. 881.

Defendant in error, therefore, on the authority of the cases above cited, submits that so far as relates to any questions of deprivation of property without due

process of law is concerned plaintiff in error has not shown itself in any position to complain, having wholly failed to establish any measure whereby a court or jury could find a substantial change in the net earnings consequent upon the passage of the act complained of, thereby lessening its net receipts to an appreciable degree. Second, having by its own act voluntarily made a rate less than that statutorily and in and by its own established tariff rate prescribed, as shown by this record, plaintiff in error can not be heard to question the reasonableness of such statutory rate, or even to aver that such statutory rate is not amply compensatory to plaintiff in error for the service rendered. It does not lie in the mouth of plaintiff in error to question this act after establishing a rate below that fixed by this law. In the light of the pronouncements against discrimination above cited, the contention respecting income can be given no greater weight than Gasconade, and with crushing force the evidence as to the 4½-cent rate convinces, even if the conditions as to abnormality in the statements, hereafter shown, were not of themselves sufficient for the purpose, that the attempted showing of loss on operation *is not made in good faith.*

II. The Statute Does Not Prescribe an Unreasonable Rate.

We may, owing to the importance of the matter, we trust be excused from adhering strictly to the order followed by counsel, so that the court may before entering upon consideration of the other features of the case be fully apprised of our position upon the facts, especially as counsel so often throughout his brief criticizes the Kansas supreme court for their expression in the opinion written by Mr. Justice Burch, "We need not analyze the evidence."

Plaintiff in error bases the larger portion of its contention upon a claimed insufficiency of revenue, as disclosed by the statements shown at pp. 101 to 107 of the record. From the conclusions attempted to be drawn

therefrom, we are impelled to express emphatic dissent. Undigested, possibly, they might be taken to support the conclusions claimed; but in the light of their internal matter, subjected to analysis, in connection with surrounding circumstances connected therewith, to which the impartial observer whose duty is to scan them can not close his eyes, the conclusions of counsel amount merely to assumptions upon false bases.

These exhibits were objected to, and motions were made to strike them out of the record. At first blush in the Kansas supreme court, in considering the matter, it was almost determined to assign gross error on their introduction. It is plainly apparent that they were not the best evidence, for it is shown that they were made up by a number of clerks in the employ of plaintiff in error, first copying data from the books of the company, sometimes referring to original bills and vouchers, sometimes not; these were then compiled by these clerks, some of whom were witnesses; the compilations were submitted to the witness Sawyer (rec. 112, 113), who, with the assistance of other clerks, made from these compilations a series of summaries, from which he prepared the statements shown in the record. In other words, as to expeditures, for instance, money is paid by the company and a receipt taken therefor, which is entered from the receipt on the company's books. This is the first copy. Then another clerk copies this, being thus a copy of a copy, or a second copy. The same or another clerk then compiles these copies, and makes an addition of such portions as is thought to enter into the particular account, being copy No. 3, or a copy of a copy of a copy. This is passed on to Mr. Sawyer, who makes another compilation, or has some other clerk do so, summarizing the accounts under their respective headings, making copy No. 4, or a copy of a copy of a copy of a copy. This, finally systematized and arranged, is by Mr. Sawyer condensed, the condensation again copied by him

and produced in court; thus we are given copy, or rather conclusion, No. 5, a copy of a copy of a copy of a copy of a copy of the entry made from the original voucher, the correctness of none of which is attested by any person, except that Mr. Sawyer avouches his own work correct, which is simply the last summary and copy, the correctness of the prior compilations, copies and books being avouched by no one. Such would hardly seem to be competent evidence. Had such evidence been taken by deposition, where the books and vouchers could have been examined by opposing counsel or party, so that cross-examination might be based thereon and the accounts analyzed and explained, then some force might be attached to the statements; but in the present form it is no more nor less than a mere *ex parte* statement, without verification or competency.

As it appears in the record, however, it is subject to such internal tests as analysis may disclose, and must further be subjected to the test of surrounding circumstances, and such other evidence or matters of judicial notice as it may be proper to invoke, and from these one can but concur with the trial judge in the observation that the question is, not what is shown, but, is what is shown, shown in good faith?

NO DEPRIVATION OF ANYTHING IS SHOWN.

First, let us see what bearing this mass of figures has upon the controversy. It is the contention of counsel that because these computations show that the company is conducting business at a loss of $200,000 per year—in other words, because it is shipping other products at a loss—that it is by this statute deprived of its property without due process of law. A more obvious case of *non sequitur* could hardly be imagined.

Again, counsel says, because this schedule of rates is legislatively prescribed, that plaintiff in error is deprived of its property. *Non sequitur secundum.*

Prima facie the statute is reasonable, and the court can not assume unreasonableness from the bald fact of

a rate being prescribed. The objecting party must show unreasonableness by proof.

St. Louis v. Telegraph Company, 148 U. S. 91.

Memphis v. Postal T. & C. Co., (C. C. A.) 164 Fed. 342.

Let us now examine these statements with reference to the question of good faith in their make-up. Exhibit C (rec. 101) is headed, "Six months ending December 31st, 1907," but on the next page, referring to intra-state shipments, it appears that it is computed, not on actual aggregate traffic for the six months named, but is extended from the aggregate for the months of July and August; in other words, as we take it, the figures are not on the actual business, but we are given simply the business of July and August multiplied by three!

Why are we not given the aggregate for the six months? Again, why are we given the business for this particular six months? Why not for a year? Why not give us the figures prepared for the State Railroad Commission for 1907? Again the question as to *good faith* asserts itself.

ACTUAL NORMAL BUSINESS CONDITIONS ARE NOT SHOWN.

The court will judicially notice that the six months mentioned are the six months in which occurred the disastrous financial panic culminating on October 7, 1909. The occurrence of, and conditions accompany, a general financial panic are always noticed.

Notice will be taken of "the conditions arising from the late financial affairs of the country (1893). It is a matter of common knowledge that a large number of manufactories shut down because of the stringency in the money market. Employers of labor were unable to continue production for the reason that no sale could be found for the product."

Braceville Coal Co. v. People, 147 Ill. 266; 22 L. R. A. 340.

So here notice will be taken of the profound de-

pression of that period; that during the particular six months shown nearly 400,000 freight cars, practically one-third of the equipment of the railroads of the country, were standing in the yards, unused for lack of business. One-third of the railway crews were laid off. The railway machine shops were running on half force, or on half time. Stagnation in railway and other business circles was heartbreaking. Hundreds of thousands of people were suffering for the necessaries of life. Free soup kitchens and bread lines were established in all the large cities. Doctor Myers was feeding a thousand destitute men in his church (Immanuel Baptist) in Chicago every morning, which was but one of a vast, but still inadequate, number of charities conducted concurrently.

These facts were conspicuously circulated in the public press of the time, and furnished an almost exclusive topic of newspaper and social comment. These six months will stand out in history, ranked with the black periods of 1837, 1857, 1873 and 1893, as a time of universal depression.

Further, the court will notice the conditions prior to that time. The falling stock market, commencing early in the year, acute in May, broken in October; the dwindling revenues of the railroads and factories, the stocks and bonds of which continued to fall through that summer, and their business painfully to diminish, verifying with marvelous similitude the prediction of William R. Lawson in his remarkable politico-sociological book, "Some American Industrial Problems," published in 1904.

Not only are we confined to this particular six months, but we are, if not in the entire list of statements, as to the intra-state shipments, limited to the results of July and August, concerning which the court will notice that during that period the agricultural communities are chained to the farm and the business man and his family are away on summer vacation; last year's crops are marketed, this year's crops pre-

paring for market; the live stock of last year is all in and slaughtered, this year's stock is running in pasture; spring and summer merchandise is on the shelves or sold to customers, with fall and winter shipments not commenced. The poorest two months of the worst six months that the country had seen for near two decades. These are the two months that are selected as a basis on which to figure that plaintiff in error is losing money. If that be the purpose, they are certainly well selected—in fact the best that could have been chosen since the palmy days of Mary Elizabeth and her vociferous ilk, when so large a proportion of the railroads were running merely on sufferance of the bondholders, or under receiverships. At the time referred to revenues were low. Operating expenses were being diminished, it is true, but fixed charges were sustained in perennial bloom. This is just the period to show a poor financial condition, *but how about the question of good faith?*

Good faith demands that the investigation of the earning capacity of the public servant, for the railroad corporation is none other, shall be such as will disclose its revenues and expenses under normal conditions. Not only are the six months covered a time of abnormal staganation, but as to a portion if not all of the statements, instead of six months' showing we are given simply three times the business of the two most stagnant months of this particularly stagnant period.

It may well be doubted if a reasonably accurate estimate could be based upon a showing of less than a year; certainly no accurate estimate of the effect of a rate could be obtained by simple multiplication by three of the results of the two months in which, during the whole year, shipping is most markedly inactive. This is especially true of products which are used for light and heat. July and August follow the summer solstice, and, as is well known, the nights are short, with a correspondingly brief period of artificial illumination. There is but little more than eight hours of absolute

darkness, and oil consumption is but a fifth or sixth that of the corresponding period after the winter solstice. Shipments of illuminating oil are in correspondingly small quantities, and proportionately less renumerative. Revenues are proportionately less, and expenses are relatively far higher. In winter it will be handled by the carload, and in summer by the barrel. Fixed charges remain constant. There manifestly can be no reliance placed on a statement prepared in such an evident spirit of unfairness.

With this in mind, it is impossible accurately to gauge the relation of interstate with intra-state traffic. If it be assumed that the entire interstate business is accurately stated, how can we compare with that three times the intra-state business for the two months of abnormal quiet? The result would be little, if any, more reliable than an effort to compare a given cylindrical solid with a truncated cone of equal base area, but without specification as to height or angular inclination. The two are not comparable to any greater degree than would be three times the area of a strip of unknown breadth on the side of a rectangular body, with the superfices of the parallelepipedon, even if the dimensions of the latter is known. There can be no means of knowing the relation which one bears to the other. We can not measure the proportion which the integers of the given business bear to the integers of the assumption based upon the abnormal period. The first, while abnormal, owing to the panic which prevailed, more nearly approaches normal conditions than can the extension of the still more normal conditions of the midsummer months of the abnormal period.

Take oil in its abstract relation. Its consumption in December is probably five times its consumption in July. Its consumption for the period from July to December, inclusive, divided by three, may be three times its consumption during July and August. It would not be fair to plaintiff in error to multiply by three the results of November and December, nor is

it fair to defendant in error to multiply by three the results of November and December. So with wheat. During July and August it is being harvested and thrashed. Heavy shipments do not normally commence until September. And so with other products.

Take oil in the concrete instance (rec. 103). For July and August the total revenue is stated at $8,796.03. November and December consumption may be three times the consumption in the summer months named, with shipments relatively larger and relatively greater economy of transportation. We may estimate, it is true, that November and December shipments may amount to $26,388.09, but no measure is given us to estimate its cost of transportation under the greater relative economy of heavier shipments, for our data as to cost relate entirely to the period of small shipments, and is a varying relative quantity, as so graphically portrayed by the testimony of Mr. De Bernardi (rec. 91 *et seq.*). The foregoing is, of course, based on the assumption that the movement of the product is equivalent to its use, which, while it may be true by approximation, is not an exact statement, as there is a tendency to anticipate to some extent the demand by early shipment, though that course is not followed in the main, as the movement of staples tends strongly to vary with the varying of demand; in connection with which is to be considered the factor of speculation, adding still more uncertainty to the great uncertainty which otherwise necessarily attends such a jumble of abnormalities as is presented in the statements under consideration.

All this, except the receipts for July-August is simply surmise, but this surmise is as reliable as the data given us regarding the intra-state traffic. No one asserts that it can be relied on to obtain even an approximation of actual normal conditions. In fact there seems to be a disposition to get as far away from normality as possible without positive misstatement. All these statements may be strictly true, but *non con-*

stat that normal conditions may not show a profitable traffic, even in oil.

Nor are we given any more reliable light by the testimony adduced to support the schedules. Mr. De Bernardi makes one statement that, if taken as made advisedly, which seems to be the case, tends strongly to discredit the correctness of the balances. He says (rec. 95) that there was a charge of fifty cents per diem for all foreign cars (meaning cars of other companies) in the service of plaintiff in error, but there was no set-off for that charge for cars of plaintiff in error in the service of other companies. In other words, plaintiff in error pays other companies for the use of their equipment, but receives nothing for its equipment used by such other companies. Can it be possible that there is not reciprocity in the car exchange service? Such an arrangement would be too unbusinesslike to impute to persons of the astuteness of those managing this railroad. The probabilities are that the arbitrary charge is a book item only, except in rare instances, and consequently does not appear in cash balances. In any event it is either a bookkeeping juggle, or a very jug-handled arrangement which should be expunged from any fair system of bookkeeping. It is a case of all charges with no credits—a loss without gain. *But it serves to charge a balance against revenue account.* Its principal office seems to be to show a greater loss or less gain, as the supposed necessities of the case may be supposed or thought to demand. Are there other items of which the same is true? Details are too meager to determine, if such there be. Yet there may be. For instance, the question of switching charges in open yards squints in that direction. (Rec. 91.)

This witness keeps his testimony in the realm of the abstract throughout, touching the concrete so lightly as to leave but little, if any, impression of basic facts. It is in the upper air of speculation, not on the basis of actualities. He "knows but very little

about rates in the operating department or maintenance" (rec. 121), yet in his opinion "the cost of handling intra-state freight would be three to five times as much as to handle interstate." (Rec. 115.)

Mr. Sawyer, on the other hand, sticks to the text, only indulging in speculation in one or two instances; but in one of those instances he very flatly differs from the other witness mentioned, for he says (rec. 111) that the intra-state business in proportion to earnings costs 50 per cent more to handle than interstate—in other words, there is a difference in the estimates of these witnesses, of enormous proportions, for Mr. De Bernardi puts the difference from six to ten times the amount named by Mr. Sawyer. There should be agreement between the administrative and auditing departments. Both can not be right.

From the figures given in these statements, however, both of them are wrong. In the exhibits at rec. 101 *et seq.*, total freight revenue is given as $4,195,731.01; intra-state freight revenue is given as $614,255.02, or 16.64 per cent, while freight operating expenses are stated as $2,927,540.34 and $586,679.08, respectively, or 20.04 per cent. Interstate freight operating expense is 69.78 per cent of earnings, intra-state freight operating expense is 97.15 per cent, a difference in favor of interstate traffic of 27.37 per cent, or a trifle more than half the figure stated by Mr. Sawyer, and about one-eleventh of the lowest estimate of difference made by Mr. De Bernardi. As interstate oil shipments are not shown, there is no basis to compute differences in those schedules; but inasmuch as Mr. De Bernardi makes the statement that oil is transported at much greater expense than ordinary commodities, and at less than carload lots entails especially heavy loss, it may be noted that notwithstanding the difficulties attending its transport, as he has stated, the revenues from intra-state oil shipments was $1.223 per ton on less than carloads lots entail especially heavy loss, it of oil shipments, an average difference of but 10.1 cents

a ton between the two kinds of shipments. The cost of transporting the oil is not stated, but can we accept with credit the statement that oil is the only commodity shipped at a loss (rec. 126) in a case where the operating revenues show a net gain over expense of but 2.85 per cent on intra-state shipments—that all the schedules are adjusted with such an exact balance that a net gain is made on each and every other shipment besides oil? As oil is but .0429 of the entire traffic (dividing $614,255.02 by 3), it can not be held responsible for other shipments at less than operating cost, nor can the 4.29 per cent be held responsible for more than a small portion of the loss during the months of July and August on intra-state freight of the sum of $33,688.95, in which months the entire revenue from oil shipments was but $8,796.03 (rec. 103), the loss being nearly four times the entire oil revenue.

As the total oil traffic of the Central Branch (rec. 107) amounts to less than one per cent (.0031464) of the total shipments, oil certainly can not be held responsible for all the loss on that schedule.

Assuming the bases to be correct, there must have been losses in revenue in other schedules besides oil, for it is a matter of common knowledge in the state of Kansas, of which the court will take notice in a case from that state, that the State Railroad Commission, after investigating conditions on a fair basis, ordered substantial reductions in freight schedules, some time after these statements were made, in some items the reduction amounting to as much as 22 to 25 per cent, and those in items of heavy shipments, which were accepted by the carriers without contest. If rates on those heavy items could be reduced without rendering them unreasonably low, as we must assume, they must, under normal conditions, have been too high. What would oil show under normal conditions?

In these schedules as so determined by the Railroad Commissioners many articles were shipped at an unreasonably high figure. Yet these schedules during

that period show a loss on intra-state shipments throughout the entire schedule during this period, when fixed charges are included. The only testimony or showing in regard to the cost of oil shipments is a theoretical assumption, and the statements of the witness who so testified are disputed by the very evidence adduced by plaintiff in error, one of which has been pointed out above—a statement so wild as to be absurd—overstating to the enormous degree of eleven times, at his smallest estimate, greater than the statemen, unfair as it was, showed the difference to be. Where is there assurance that his theoretical estimate of the cost of oil transport is any nearer the mark? Furthermore, it is to be remembered this is the witness who "knows very little about rates," etc. (Rec. 121.)

If the schedule of freight tariff rates were so high on some articles as afterwards to call for interference by the State Board of Railroad Commissioners, and yet the road was losing money at this time on intra-state shipments, what articles accounted for the loss? The eleven full cars and ten or twelve partially filled cars of oil, which this statement shows were shipped over the Central Branch, could not account for a loss of over $3800 during July and August, even though those cars paid ALL the expense of trains which hauled them. There must have been some commodities handled without profit during those months, Mr. De Bernardi to the contrary notwithstanding. (Rec. 86.)

As we have said, there is nothing dependable in this record on which could be predicated any accurate, or approximately correct, estimate of the effect of this act upon oil shipments; we may go further and say that there is no showing upon which any estimate of any value whatsoever of that nature could be deduced therefrom.

Upon comparison with the claims of counsel and his doleful remarks upon the condition of plaintiff in error, which would seem to be equally applicable upon a motion to appoint a receiver, with the facts as stated

and commented on by the court in the case of Missouri Pacific R. Co. v. Kansas, 216 U. S. 762, it is apparent that with plaintiff in error the poverty plea is a matter of habit; and it may further be remarked that in substantially every case in the books every attempt at regulation is hailed by counsel for the respective carriers as a dire portent of financial disaster to the particular roads affected; and as the reports include practically all the railways in the country, the fact that the officials are still drawing their salaries affords persuasive evidence that the lugubrious lamentations and doleful prognostications of such counsel are not always to be taken too seriously.

Are we to infer from the argument of counsel that the Missouri Pacific Railway Company in its operation for July-August, 1907, lost $33,688.95, because it carried about three hundred and fifty cars loaded with oil? That it lost $96.25 on every car so shipped, be the distance long or short? That the average revenue from each car of merchandise transported, $25.36, because of shrinkage to $25.01 in the case of oil, and as that commodity amounted to a trifle over four per cent of the entire volume of shipments—one car in twenty-five spelled disastrous consequences to the carrier? it seems to the writer that the bare statement is complete refutation of such assumption.

Probably an apology is due the court for so exhaustive an analysis of the evidence, especially as we understand the rule in this court to be that where there is a trial at law before a puisne court, and the trial court does not make findings of fact, the general finding is conclusive upon the supreme court, precisely as the verdict of a jury (Lehnen v. Dickson, 148 U. S. 71); but we have felt impelled to this prolixity for the dual reason that not only has counsel in his brief so frequently reiterated his criticism of the Kansas tribunal of last resort for its failure show analysis of the evidence, remarking upon lack of necessity therefor, but so it might otherwise seem that we tacitly ac-

ccpted what appear to us as unwarranted conclusions drawn by counsel, who has himself discussed the evidence at some length.

NO VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS SHOWN.

There being no showing of any reduction in rates of oil transported, there can be no violation by the legislation of the due process clause of the fourteenth amendment. The record may be searched in vain for any evidence tending in the remotest degree to show reduction at all, least of all by the legislation. The tendency of the evidence is all to the effect that there has been no reduction. Plaintiff in error bases its entire contention upon its attempted showing of general loss in operation, and the further attempt to show that oil is transported at less than its cost of carriage. We have, we trust, sufficiently demonstrated the unreliability of the evidence introduced to support the first proposition; and as to the second, it has been remarked that the cost of oil transport is nowhere disclosed by the evidence. But conceding for the purpose of argument, without admitting that it is shown as an independent fact, that oil is transported at a loss by this particular carrier, it by no means follows that the rate prescribed is either confiscatory or unreasonable. There is no attempt to show what a reasonable figure would be, nor what is charged by carriers in Kansas generally. Neither does it follow that because an article may be carried at a loss the rate is unreasonable. In the testimony of Superintendant De Bernardi, he makes assertions which, while avoiding anything tangible in the way of a concrete showing by figures of what the cost of oil carriage is and has been, can only be taken as indicating that oil has always been transported at a loss (rec. 88 *et seq.* 96), thus indicating that even if reduction had been made it would be *damnum absque injuria*, for it is in only a slight degree, not in kind, being further but

a repetition of loss which has been a self-inflicted injury.

There is a rule termed the rule of commercial necessity, whereby certain commodities are transported at a figure below the average of tariffs, sometimes at an actual habitual loss; and the fact that such rate may be prescribed as to a particular commodity will not from that fact alone lay the prescription open to the imputation of unreasonableness.

State v. Minneapolis & St. L. R. Co., 80 Minn. 191.

S. C. Affirmed *sub nom.* M. & St. L. R. Co. v. Minnesota, 186 U. S. 257.

The court says: "This rule is in every-day practice with carriers, and that it is well known and justified in business circles, and is tolerated and approved of because of the necessity, can not be overlooked by the courts, any more than it is by legislatures, or by commissioners, or by the carriers themselves."

Mr. De Bernardi substantially asserts that petroleum is of this class. If so, of what value is the mass of figures in this record? This being the case, and as the product is and has been habitually shipped at a loss by this carrier, why should plaintiff in error complain of injury which the exigency of business or its own act has voluntarily occasioned?

In the record it is clearly shown that defendant in error was charged $7.30, as was admitted by plaintiff in error at the trial, while at the rate given habitually to another shipper (rec. 127) the charge would have been somewhat less than $4.69. Under circumstances of such palpable discrimination, plaintiff in error would be in no position to complain had either the legislature under its police power, or the Kansas Board of Railway Commissioners under their delegated power of supervision, seen fit to enforce the 4½-cent rate throughout the state. The test of reasonableness is not alone of compensatory returns for service. Pub-

lic interest, not private revenue, is the ultimate criterion. The supreme court of Florida recently well said:

"The burdens of lawful governmental regulations are assumed by common carriers in undertaking to render the public service, and such burdens are not invasions of property rights.

"The respondents are permitted by the state to use franchises in rendering the public service voluntarily undertaken by them. These privileges carry with them the absolute primary, imperative duty to render an adequate service reasonably suitable to the needs of the public to be served. . . .

"A reasonable compensation for service rendered is a property right of the respondents, but this does not necessarily insure a full return for values used in the service. Whether such reasonable compensation produces a return for property, management and labor used in rendering the service depends upon circumstances, and the risks and burdens of the contingency are assumed by the carriers in voluntarily undertaking the public service. The prime duty to render a safe and reasonably adequate service is required by the law to be effectually performed, whether such performance is profitable or not."

State, *ex rel.*, etc. v. Railroad Company, 57 So. 673.

Discriminatory rates have been so frequently condemned and declared to be indefensible and intolerable that it hardly needs further reference to Standard Oil Co. v. U. S. (*ubi sup.*) or other authorities. This court has expressly declared the existence of such rates to be sufficient warrant for prescription of a non-compensatory rate, not only as to a single product, but also as to an entire scheme of rates, stating exceptions to the general rule thus:

"It is unnecessary to decide, and we do not wish to be understood as laying down an absolute rule that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unreasonable. . . . There may be circumstances which would justify such a tariff; there may have been extravagance and a needless waste of money; there may be waste in the management of the road; enormous sal-

aries; *unjust discrimination to individual shippers*, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is not sufficient business to sustain a road," etc.

Reagan v. Farmers' L. & Tr. Co., 154 U. S. 362, *loc. cit.* 412.

In so flagrant a case of discrimination as here shown, public interest, public policy, and public welfare demand adequate means for fixing rates at least as low as those habitually given the most favored shipper, and especially is this applicable to an integral product, the theme of such notorious comment and animadversion as the oil traffic. This means exists under the police powers granted the legislature and their delegates.

Ala. & V. R. Co. v. Mississippi R. R. Com., *supra*.

Seaboard Air Line Co. v. Florida, *supra*.

As above stated, other reasons for noncompensatory prescriptions for service exist and have been recognized in numerous instances. Public interest and even custom, under the guise of "commercial necessity," may outweigh the usual considerations entering into the fixing of a rate. Carriage at habitual loss is of so common occurrence that the courts take judicial notice of the usual course of business in that regard, and will refuse to condemn as unreasonable a prescription of that nature, when falling within the rule of necessity or demanded by public interest.

State v. Railroad Co., 80 Minn. 191, affirmed 186 U. S. 257.

State, *ex rel.* McCue, v. Northern Pac. R. Co., (N. D.); 25 L. R. A., n. s., 1001. (The third paragraph of the syllabus is somewhat misleading, ignoring this principle which is clearly recognized.)

S. C. affirmed, 216 U. S. 579.

Analogous to this principle is that recognizing the right to compel a road to put on additional trains at a

positive loss, whether it be for public safety, or mere personal convenience.

Atlantic C. L. Co. v. North Car. Com., 206 U. S. 1; see, also, note to S. C., 51 L. ed., at p. 942.

Missouri Pac. R. Co. v. Kansas, 216 U. S. 262.

Similar considerations may render reasonable other requirements where expense is entailed, in instances where public health, safety, or convenience may be concerned. There can be no difference in principle between a requirement compelling outlay of money for such purposes—and a lessening of income by reduction in rates. Both are within the governmental police power. A multitude of such cases might be cited. The same powers and principles are involved in other instances, such as compelling stoppage of trains at county seats, connecting points, or cities beyond a certain amount of population, etc. The following are illustrative:

Requiring a water company to make service connections, though the requirement exists by implication only, and at the cost of the company, is not a violation of the provisions of the fourteenth amendment.

Consumers' Co. v. Hatch, (U. S.) 32 Sup. Ct. 465.

The statements of fact in reported cases may be taken into consideration in fixing what is a reasonable charge, and a charge in enforcement of local government as such is not in itself obnoxious to the constitution.

Memphis v. Postal T. & C. Co. (C. C. A., 6th Cir.), 164 Fed. 342.

With the citations made by counsel we have no quarrel, as these all assert the right to regulation. We do not take issue with the principle that as a general rule rates prescribed must be fairly compensatory, and as a general thing must be sufficient to pay reasonable operating expenses and interest on the bonds of the road. But as applied to the case at bar the citations are decidedly malapropos as we view them. Plaintiff in error does not meet the question of the evident lack

of good faith in the statements—does not assert that a reasonable and fair estimate can be made from a showing of earnings in panicky times, neither does it attempt to palliate or deny the discrimination of which it has been guilty as shown by the record, nor make any attempt to show the cost of the transport of the particular product affected. As said by Mr. Justice Burch, in his opinion in the Kansas supreme court: (Rec. 159.)

"It is not necessary to analyze this evidence. Some of it is open to the suspicion of want of good faith. Thus the only showing with reference to revenue from intra-state oil shipments consists of receipts for two months of a single year, and those months are July and August. Indeed there is nothing in the evidence showing what a reasonable rate for the transportation of oil would be or that the legislative rates are too low. The figures to the effect that the Missouri Pacific Railway Company loses money every year on its Kansas business do not tend to show either of these facts. Further, suspicion is cast on this evidence by proof presented by the plaintiff showing the defendant voluntarily made double line shipments of oil in less than carload lots to a noncompetitive point beyond the one where this controversy arose at less than the statutory rates. In the case of Chicago, &c., Company v. Wellman, 143 U. S. 399, Mr. Justice Brewer pointed out how easily courts might be misled into doing a grievous wrong to the public by striking down legislative rate acts on general statements and without the fullest disclosure of all material facts."

This shows a very cogent excuse absolving a court from analyzing the evidence in the record. The court practically impute bad faith in the evidence of plaintiff in error, and note with emphasis the discrimination disclosed, and impliedly, though not directly, charge that the showing is either not in good faith or the road is inefficiently managed, as shown by the quotation from the Wellman case.

The record is wholly barren of the salient information necessary to be shown in order to convincingly establish that unreasonableness under all the circum-

stances disclosed, not merely that the road is losing money in shipment of coal, groceries, cereals or other properties, but that such improper burdens are by the act imposed that the company is by that particular act deprived of its property without due process of law. If a rate be placed at a noncompensatory figure for the reason that thereby the danger of known and notorious discrimination (such as here shown) be minimized, and the rate is still more than that charged the favored shipper habitually, the rate so prescribed is neither unreasonable nor unconstitutional, for such exercise of the police power is imperatively demanded for the public welfare, and particularly when such discrimination is in the face of not only the instant legislation, but as well other statutes denouncing the discrimination under penalties and damages theretofore proved ineffectual for the purpose intended.

The legislation is presumptively reasonable, and the burden is on plaintiff in error to show that the rate is unreasonable from every angle.

Texas & P. R. Co. v. R. R. Com., (C. C. A.) 192 Fed. 280.

Here the commission based their finding that the rate on cotton seed and its products was reasonable upon the fact that the old rate was higher than other roads required and was discriminative, following

R. R. Com. v. Cumberland Tel. & T. Co., 212 U. S. 414.

See, also, So. Pac. Cov. R. R. Com., 193 Fed. 699.

The following presumptions obtaining, of universal application, guiding not only in the interpretation of a statute, but as well in determining the onus and quantum of proof in cases involving statutory construction from a constitutional viewpoint:

If the statute be doubtful, the court will presume that the legislature intended the enactment of a valid, sensible and just law.

Black on Interpretation, 87.

If will further be presumed that the legislature did

not design any attempt to transcend the rightful limits of its authority.

Ibidem, 89.

Every act is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favor of the validity of the act, and the court will not adjudge it invalid, unless its violation of the constitution is clear, complete, and unmistakable.

Id., 93, and cases there cited.

Sinking Fund Cases, 99 U. S. 700.

1 Willoughby on Constitutional Law, 20, 23.

It is seen from the last canon that the party assailing a statute on constitutional grounds not only has the burden of showing a state of facts under which the unconstitutionality may be declared, but the quantum must be such as to exclude all reasonable doubt. This may appear from inspection, but if proof *aliunde* be resorted to, it must be clear and convincing under the above rule.

Charges must be reasonable, is the requirement of the law, as expressed by the cases. As to the question of reasonableness, the test is not alone if it be compensatory to this or that particular individual. If a cabman sees fit to take his stand in a back alley, he must take his chances of custom there, and can not complain of the unreasonableness of rates fixed on the basis of normal conditions of standing at a depot or place of popular resort. Equally improvident would be the testing of the rates by the receipts of the cabman in the hours when there is but little travel. Wisdom of selection must enter into the equation. An extravagantly high rate provides not sufficiently for a prodigal management, nor can any reasonable compensation suffice to cover the deficiencies of intellect of the back alley cabman, nor of the railroad management which runs a line in a dreary waste of sand without outlet.

Reagan v. Farmers', etc., Co., 154 U. S., *loc. cit.* 412.

Reasonableness should be determined from average

normal conditions. If a railroad company wishes to obtain condemnation of acts of legislative control, it must show itself under competent management, without undue extravagance in the salary list or operation.

C. & G. T. R. Co. v. Wellman (*ubi supra*).

"The public can not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. [Under adverse conditions or improvidence] if a corporation can not maintain such a highway and earn dividends for stockholders, it is a misfortune for them and it, which the constitution does not require to be remedied by imposing unjust burdens on the public."

Covington & L. T. Co. v. Sanford, (U. S.) 17 Sup. Ct. 198, 205.

Dow v. Biedleman, (Ark.) 5 S. W. 297. S. C. affirmed, 125 U. S. 680.

St. L. & S. F. R. Co. v. Gill, 54 Ark. 101; 11 L. R. A. 452. Affirmed 154 U. S. 649.

Purdy v. Erie R. Co., (N. Y.) 48 L. R. A. 669.

The application of the Minnesota case, 134 U. S. 418, is not to be taken as to cases of direct legislative control. That case was decided under considerations of potentialities of abuses in delegated powers of the legislature, and sought to interpose a check against unwarranted assumptions by a body of no direct responsibility to the public. In the dissenting opinion of Mr. Justice Bradley, he considers that decision as a virtual overruling of Munn v. Illinois, and if the opinion be taken literally, it would almost seem that Mr. Justice Bradley was correct, although the majority disclaim such purpose. However, the court before long took occasion to reaffirm, with deliberate emphasis, the doctrine announced in the Munn case, carefully reviewing the underlying principles in that famous decision, and adhere to the rules there enunciated. The court clearly distinguished the Minnesota case, saying that not only is the legislature given, under the police power, the clear right to fix rates, in which it necessarily is given wide discretion, but when the leg-

islature shall directly fix the rate, the rule that the question of reasonableness is a judicial one does not apply, but the rate fixed must be reasonable. Judicial determination, as there pointed out, does not precede the execution of the law, but on attempted enforcement it may be invoked in a proper case.

Budd v. New York, 143 U. S. 517.

See S. C. below and note, *sub nom.* People v. Budd, 5 L. R. A. 559.

Munn v. Illinois, 94 U. S. 113.

In the dissenting opinion of Mr. Justice Bradley in the Minnesota case is contained an expression adopted by Mr. Justice Brewer in the Budd case in his dissent, in the following language:

"The state may build them *i. e.*, railroads, Justice Bradley makes a duty). If an individual does that work, he is doing *pro tanto* the work of the state. He devotes his property to a public use. The state doing the work fixes the price for its use. It does not lose the right to fix the price because an individual voluntarily does the work."

This doctrine that the state is simply farming out, so to speak, the operation of public utilities, was more recently announced by the full bench. In Smyth v. Ames, 169 U. S. 466, at p. 544, this court said: "A railroad is a public highway, and none the less because constructed and maintained through the agency of a corporation deriving its existence and powers from the state. Such a corporation was created for public purposes. It performs a function of the state. . . . It can not, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public." The same idea pervades all cases of rate regulation.

This exercise of legislative discretion is subject to judicial supervision to no greater extent than is like exercise in any applications of the police power; the occasion for judicial determination does not arise un-

til the law is applied as effectual. There may be cases in which the wide range of rates includes so many conflicting questions of public policy that it is an act of wisdom to provide for judicial determination prior to execution, and in other cases, where made through delegated powers, anterior judicial sanction may be not only advisable but imperative, but the writer has not found a case of direct legislative prescription of rates on a single article of transport where any court of last resort has held indispensable to validity, or even suggested the advisability of, judicial determination prior to the execution of the law. A vast number of cases might be cited where such prescription has been upheld in which such supervision has not been provided for, or means of such determination, even though providing involved rates on many different products. Several such cases have been cited above. *Communis opinio evidentia legis.*

We submit that the statute is not obnoxious to the clause of the fourteenth amendment relating to due process of law, and under the circumstances of this case plaintiff in error can not urge that it prescribes unreasonable rates.

III.

Nor is the Statute Repugnant to the Equal Protection Clause of the Same Amendment.

In invoking the operation of the equal protection clause, plaintiff in error relies practically exclusively on the failure of the legislature to provide anterior judicial inquiry as to unreasonableness of the rate prescribed. As there is a total failure to show what rate had been charged prior to the enactment complained of, and every intendment must make against plaintiff in error in that regard, for not only did it have the burden of proving the rate unreasonable and it had superior knowledge, in fact it can not be presumed that defendant in error had any knowledge in that respect (Standard Oil Company v. United States,

supra), and plaintiff in error produced no evidence tending to show a higher rate at any time, it will be presumed that the statute made no change in rate, in fact every presumption is against the theory of a change in rates under the doctrine *nolumus mutari*, we fail to see the application of the principle invoked, viz., that appeal to the courts is necessary to the present case. If no change was made by the act what would there be for a court to try if appeal were to be made to it?

9 Ency. of Evidence, 906.

Atlantic Coast Line R. Co. v. Florida, *supra*.

Telegraph Company v. Richmond, *supra*.

St. Louis v. Telegraph Company, *supra*.

Memphis v. Postal T. & C. Co., *supra*.

If a change in rates in fact was made by the act, why did not plaintiff in error show it?

It is said (plaintiff in error's brief, 21), that no public officer is charged with the enforcement of the act, so there is no handhold to test it in equity. Nor is there such opportunity in any case sounding in tort for damages, whether of common law origin or given by statute. Imagine the provisions of the statute of Westminster Second subjected to such a "test"! Conceive such a test for the action of trespass on the case which was originated by that thumb-worn statute!

"The railroad company," complains counsel, "can originate no action. The shipper may, to recover the statutory penalty." Counsel mistakes not only the terminology, but the nature of the remedy given the shipper. This is an action for damages expressly given by the statute, not a penalty. If it were for a penalty, the only remedy therefor at common law would be an action in debt on the statute. This action would be trespass on the case at common law. This action sounds in tort.

Smith v. Chicago & N. W. R. Co., 49 Wis. 443.

Heiserman v. Burlington C. R. & N. R. Co., 63 Iowa, 736.

Graham v. Railway Company, 53 Wis. 473.

The complaint of counsel, therefore, leads to no conclusion. If the company can originate no action, that is by no means idiosyncratic. Neither can a tort feasor originate an action. Nor can a railroad company after negligently injuring a careful stranger or passenger do so. The Kansas statute abolishing the fellow-servant rule contained no provision whereby the causes of the negligent act occasioning an injury to a servant could be inquired into, yet the act was upheld by this court in the Pontius case, 157 U. S. 209. Nor is there suitable provision under the numerous statutory provisions of Kansas creating sundry causes of action arising under the chapter entitled "Railroads," hereinafter mentioned, according to the theory of plaintiff in error; yet nearly all of them have stood the test of review by the supreme court of the state of Kansas, and not a few of them, either from Kansas or upon review from other states having similar statutes, have been sustained by this court, and many of them have been in force for many pears without question, although hardly any but should be held unconstitutional if the theory proposed by plaintiff in error should be adopted.

This contention is tantamount to a postulate that any legislative exertion of the police power, whereby common carriers or other operators of public utilities are restrained in their charges, or, *e converso*, put to any expense in providing for the safety or convenience of travelers, shippers or other users; for if the former is law the latter must be, must affirmatively provide for means of a judicial investigation of the reasonableness of the requirement before the act shall become operative.

What a humane provision that would be! Every time a city passed an ordinance to prevent extortionate cab fares, hack fares or bus fares, there must be a provision for testing the reasonableness of the rate fixed. Every exertion of the police power in preventing extortion in elevator charges must, in like manner,

be weighted with a clog to its enforcement. Every law providing for erection of fences for protection of or against stock must be hedged in a similar manner. All the police powers granted municipalities, of every kind, must be hampered with like restrictions. In short, every regulation of charges for service of those who operate public utilities, and every requirement for public health, safety, convenience or welfare, entailing expense to such operators, and as well the owners of any kind of business charged with a public interest, must provide in its means of enforcement for velvet gloves enclosing hands of putty!

Every ferryman, every stage owner, every toll gate keeper, every carter, every warehouseman, every innkeeper, every agister or public stableman, every bridge tender, every butcher and baker and candlestick maker, as well as every railroad operator—in fine, everybody whose business is subject to public interest and use—must be especially licensed to rush into court and require the seal of judicial approval of laws before obeying them. The property rights of the poorest baker, the size of whose loaf is fixed by law, or of the most humble milkman, who has the minimum amount of butter fat contained in milk supplied his customers prescribed by public authority, are just as sacred, and entitled to the same tender consideration in applications of the police power as those of the most powerful railway magnate—otherwise there is no equality before the law.

Is it true that every time the legislature makes a requirement that hotels of more than two stories in height shall be provided with efficient fire escapes, it must provide that any innkeeper shall have the right, on showing that his old hostelry is losing money anyhow, to obtain a judicial annulment of the legislation, not only as to himself, but as to every house of entertainment for wayfarers?

If that be the law, the discretion as to applications of the police power rests not in the legislature, as we ig-

norantly suppose, but resides only in the judicial forum. It would mean that every penalty imposed, whether corporal or pecuniary, on behalf of the public, and as well every remedy given private parties damaged through infractions of the law, must be subject to some means of judicial investigation of the reasonableness of the requirement, in depriving the malefactor of property, or the tort feasor in private injuries, if the one or the other shall be conducting business charged with public use or interest—that is, an anterior inquiry into the reasonableness of the deprivation, the reasonable value of the investment, income and expenditures considered, of the malefactor or tort feasor as the case may be, before there can be prosecution for the penalty in the case of the malefactor, or institution of action for damages for the injury in the case of the tort feasor, or the legislation can not stand before the constitution—and it would make no difference, be the infraction of the law how palpable soever, even if there be legislation creating no change, simply crystallizing existing conditions, as in the present case, for here the evidence shows no change in rates, existing conditions being given the force of law, so far as the record shows, adding simply the provision for damages in case of overcharge and affixing penalties for discrimination.

If that be declared to be the law, as insisted by plaintiff in error, there is no legislative discretion in the case of business charged with public use and interest, for that is not law which is unconstitutional, and such interpretation would mean simply a judicial declaration that such legislation shall be, after the judicial pronouncement upon its reasonableness, the law of the land; in other words, the court says by its judgment, not *that is*, but *that shall be* the law of the land, for under the construction of plaintiff in error the new legislation would be wholly inoperative until the judicial investigation, hence is not existing law until examined, and having no operation, it has no

legal existence or status before the judgment, by force of which, and not by force of the legislative act, it is given vitality. It has always been presented to us that it is the province of the legislature to provide *what the law shall be*, while it is the duty of the court to determine and declare *what the law is* with reference to a *given state of facts*.

McGehee on Due Process of Law, 77.

Roller v. Holly, 176 U. S. 398.

That, as it appears to us, would be the acme of unreasonable segregation, for it would accord to utility operators and such like, protection and immunity given no other person or individual, whether in public, business, or private life, throwing around them an impenetrable case or armor of dual legislation, for it requires the concurrence of both departments—a legislative initiative and judicial referendum in every instance.

The theme and burden of the argument of plaintiff in error with respect to equality of protection is an imputation that the legislators, in passing chapter 353 of the Laws of 1905, acted on insufficient premises, and deprived plaintiff in error of something (which it is not shown it had) without its right to such anterior judicial investigation—rather judicial legislation. No such right existed unless this court erred in Munn v. Illinois, *supra*, which they deny in Budd v. New York, *supra*, and in numberless other cases since the Munn decision, which error has been repeated by the courts of last resort of every state in the Union. It must be presumed that the legislators did their duty, no small part of which was to satisfy themselves that their action was on sufficient information and proper premises. To compel submission of every exertion of the police power, or even limited to such exertions as are directed to the line of fixing charges for public service and compelling expense for public convenience and safety, to the judicial department before the law be made effective, would be an encroachment on the legis-

lative department far-reaching in its effect. The presumption of official rectitude is cast about the legislature, and should not be lost sight of. *Omnia praesumuntur acta esse rite, donec probetur in contrarium,* is applied to all official acts of the legislature as well as to all other branches of the public service.

9 Ency. of Evidence, 944.

The principal authority relied on by plaintiff in error is the case of *Ex. p.* Young, 209 U. S. 146. It may be questioned if that application of that case is not to be limited strictly to those cases where there is direct inhibition to parties of recourse to federal courts in the first instance, or implication of such prohibition, by enormous penalties. (See W. U. Tel. Co. v. Richmond, U. S. Sup. Ct. Rep. 449, 452). It is to be noted that in the Young case the restraining order and interim injunction only forbid publication and putting in force the schedule in the act of the Minnesota legislature of April 18, 1907, the court refusing to enjoin the two-cent-fare law (act of April 4, 1907) and the schedule of rates theretofore adopted by the State Railroad and Warehouse Commission (209 U. S. 132). The earlier act did not provide for anterior judicial investigation, and as the decision of the circuit court is affirmed, that action is impliedly approved by this court, as this court does not suggest that anterior judicial sanction of the act of April 4 was indispensable to its validity; hence the Young case is really authority for defendant in error, rather than the opposite.

In the Young case there had been violent reductions in rates in Minnesota, and the incomes of the companies had been pared down to the narrowest limit of earnings consistent with adequate service. The last act was passed making introducing a scheme of other deep cuts in revenues. The court nowhere say that preliminary judicial action is indispensable to the validity of the act, which course, however, is strongly recommended in case of an extended schedule of rates; but the court do say that because of the intimidations

of the enormous pecuniary and corporal penalties, the right to institute an action, if the railroads saw fit, was as practically denied as if it had been in terms prohibited in the act, which, if so provided, would certainly render the act void as repugnant to the federal constitution. It is further to be observed that the state officials, made defendants in the bills in the federal circuit court, demurred to the bills, thereby admitting that the rates prescribed were unreasonable and confiscatory as alleged in the bills, so that the act was unconstitutional by the confession, if not on its face. The act therefore had no proponent, but was impliedly condemned by the state officials themselves. The decision proceeds on the theory there that was to be imputed to the legislature the design to make the decision of the legislature conclusive, on a schedule confiscatory by confession, if not on its face.

In the case at bar, vastly different questions are presented by the record. There is here no involved scheme, but a simple integral rate. There the question as to unreasonableness is solved by the admission of the state officials that the rates were unreasonable—here the question as to unreasonableness is solved by the company itself, in two ways: In the first place, by the fact that there is evidence that the rate is prescribed by the company (see Joint Freight Tariff No. 8; rec. 104); in the second place by the habitual carriage by plaintiff in error of the same product at a rate twenty-five per cent below the legislative rate (rec. 127, *et seq.*), both of which were as conclusive admissions by plaintiff in error that the Kansas rate was reasonable as the demurrers of the state officials in the Young case were confessions that the Minnesota rates were unreasonable.

There is no analogy between the present case and the Young case. Counsel attempts to draw some line of similarity, by speculation as to what might occur if his client violated the statute by overcharge on every shipment—that is, went over the company's rate, pre-

scribed by its own officials and were sued for each dollar collected. There are in this record four instances of shipment, one overcharge and three undercharges. On the first the company is liable to $500 damages; on the undercharge it is liable for $500 penalty for discrimination. There has never been prosecution for the discrimination, so far as we know, so plaintiff in error manifests no concern as to the penalty for malefacient actions denounced under the penalty. As this is the only action under the statute which has reached this court, or been reported in the reports of the supreme court of Kansas—and the statute has now been in force seven years and a half—we feel entirely safe in assuring plaintiff that its apprehensions are as groundless as the baseless fabric of a vision, for it is obvious that neither actions for damages nor prosecutions for penalties have been or will be pursued with any especial vigor. Indeed, from the evidence here it may be safe to assume that plaintiff in error is still pursuing the same course—charging the Tuckers the statutory rate or over, and the Bergers the statutory rate or under, according to the circumstances of the particular case, particularly according to the identity of the persons from whom the individual consumer shall make purchase—and there is not a ripple on the surface of oil transport, legally speaking, except this little wavelet. This tends to show acquiescence in the law by the carriers generally, and affords strong if not an irrebuttable presumption that the rates prescribed are not only reasonable but are eminently satisfactory to the carriers generally.

In the case of Mo. Pac. R. Co. v. Nebraska, 217 U. S. 207, the vice of the legislation very obviously rests in the fact that the statute leaves the question of unreasonableness wholly to the applicant for the side track. No question of public necessity, safety or convenience is left open. All that would be necessary under the statutes would be for some speculator to erect at any accessible point an elevator and demand

the trackage facilities, and if the demand be not compiled with the penalty is, by the act complained of, automatically operative, thereby foreclosing any question as to reasonableness, that is, as demanded by public necessity or convenience, of the requirement. The requirement was one which demanded service for private, not public, ends and interests, and no provision is made for compensation.

In North American Storage Co. v. Chicago, 211 U. S. 306, subsequent inquiry was held sufficient, and this case was remarked on in the preceding case, which is also different from the present case; for there, manifestly no great harm could be occasioned by the mere refusal of a demand to build a side track; there were no public interests involved unless demanded by public necessity or convenience, and the inquiry as to reasonableness might be conducted in even a laggard manner without injury to the public; here the legislature was confronted with an acute situation, damaging to the public by a system of overcharges and discrimination, notorious, emblazoned in almost every issue of the public press of the time, evidence of both overcharge and discrimination appearing in this record.

Smyth v. Ames, 169 U. S. 466, was a case where it was contended on the part of the proponents of the rates that appeal to the state courts was exclusive, and it was held that wherever these existed a cause of action, adversary in character, and there were present the requisite essentials of federal jurisdiction, a party could not be denied the right to invoke the jurisdiction of the federal court; and further that by the very act under which the contention was made, that there was impliedly, if not expressly, jurisdiction given to the federal court in which the suit was commenced.

IV. The Act is Not Class Legislation.

In the charge of class legislation plaintiff in error opens with a complaint that it was not made subject to similar provisions as those contained in chapter 315 of the same session. This complaint, if made under-

standingly, can hardly be made seriously. By that act the rates fixed by the legislature were far less on the average than those fixed by the act under discussion. The rate fixed by the pipe-line act, when the rates are reduced to terms of weight, average less than half of those fixed by the railroad rate, and those rates are not subject to judicial review prior to being made effective, as the most cursory reading of the act will disclose. By that enactment the charge for transmission six miles is 1.71 cents per hundred pounds, as against five cents by chapter 353. For transmission 300 miles, the rates under the different chapters are 7.143 cents and 11.5, respectively, per hundred pounds, the disproportion for relative distances being, of course, due to the different methods of handling and forwarding. Does plaintiff in error subscribe to the lesser rate as applied to its lines in Kansas? Why, then, this commotion about unreasonableness of the present rate? Under that act judicial supervision is given only as to the lower rates to be thereafter fixed by the commissioners. Further contrasts will be made hereafter.

Under chapter 278 of the Laws of 1907, cited by counsel, the legislature made a flat reduction of fifteen per cent in the rates then existing for the cereals named in the act, without opportunity for anterior judicial examination, and denounced violation of the act by directors or managers of any kind, under penalties of $500 to $5000. Does plaintiff in error court that penalty for its officers and sigh because it is not in the present act?

In chapter 277 of the same session was a law requiring carriers to furnish double-decked cars for sheep transport, providing for damages to the shipper refused the accommodation of $50 to $200, and no preliminary judicial examination is provided for. This in not cited by plaintiff in error.

In chapter 276 of that session (also not cited) is a requirement to transport stock at 15 miles per hour

under penalty of damages to the amount of all shrinkage, fall in market, extra expense, etc., with attorneys' fees, without anterior judicial examination (or benefit of clergy).

Plaintiff in error also cites section No. 4, chapter 340 (Laws 1905), to which are expressly applied all penalties and remedies given under Laws of 1901 (ch. 286, sec. 15); these were triple damages and attorneys' fees to persons injured, and penalty of $100 to $5000 to the state for every violation of the statute itself, and $100 a day for violation of any order of the Railroad Commissioners. And plaintiff in error is pining because it is not subject to these provisions in the case of oil shipments.

The multifold relations of carriers with different lines of business render necessary specific legislation applicable to the different kinds of business, and in like manner the relations of the oil business require different legislative provisions suitable to the relation in each instance. Rates applicable to carriage by rail require different treatment, different formulas from shipment by water, and different considerations from shipment or transmission by pipe lines. The legislature in its wisdom made such reasonable classification as in its discretion was thought best. A hasty review of some of the other provisions of the Kansas statutes shows how wide a diversity of classification is necessary in the relations of railways with other lines of shippers than those above mentioned. This is made with a view of showing the different provisions deemed by the legislature to prevent injury to the public, especially as to damages given private shippers. Many other provisions are made, these being selected as illustrative:

For killing stock, damages and costs, with attorneys' fees. Laws 1874, ch. 94; G. S. 1901, sec. 5859.

For neglect to erect cattle guards, damages and costs. Laws 1869, ch. 81; G. S. 1901, sec. 5867.

For loss by fire (made presumptively negligent),

damages suffered, with costs and attorneys' fees. Laws 1885, ch. 155; G. S. 1901, sec. 5923.

Loss on shipments of grain and live stock, damages and costs. Laws 1887, ch. 228; G. S. —.

Neglect to give bill of lading, damages suffered, with costs and attorneys' fees. Laws 1893, ch. 10; G. S. 1901, sec. 5937.

Neglect to furnish transportation in shipment of stock, damages for stock injured or killed, costs and attorneys' fees. Laws 1898, ch. 30, secs. 1, 2.

Violating any of provisions defining duties of Railroad Commissioners, triple damages, costs and attorneys' fees to any person damaged, in addition of penalty of $100 to $5000. Laws 1901, ch. 286, secs. 158, 159, and costs of suit in addition G. S. 1901, secs. 5993, 5944, 5995.

Failure to comply with any order of Railway Commissioners 30 days after notice, penalty of $100 for each day.

This act gives power to fix rates for freight, G. S. 1901, sec. 5978; passenger rate fixed, *id.*, sec. 2980; and discrimination in any form is prohibited, *id.*, sec. 5985.

On confiscation of coal by railways, company shall within thirty days pay value at place of destination with 15 per cent added, attorneys' fees added if not paid in thirty days. Laws 1905, ch. 343.

Neglect to furnish cars, with demurrage for delay, per diem damages. Laws 1905, ch. 345.

Neglect to furnish caboose of freight train with conveniences, penalty of $20 per day for each car. Laws 1905, ch. 346.

For failure to maintain station and stop all trains at county seat of over 50,000 people, penalty $50 per day. This actually applies to Kansas City, Kan., only.

Nearly all of these have been held valid by the supreme court of Kansas, and several by this court. Many other provisions are made giving damages and attorneys' fees to persons injured.

Plaintiff asks, "Why classification into single and

double lines?" Manifestly to pay for additional necessary clerical work and truckage entailed in transfers from one road to another.

Counsel quotes from Citting v. Stockyards, 183 U. S., but does not notice the following language of Mr. Justice Brewer in his opinion (p. 111):

"It would practically defeat legislation if it was laid down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope, or subject all to the same burdens. It would strip the legislature of its inherent power to determine generally what is for the general interests, which interests may often be promoted by certain regulations affecting one class, which do not affect another—certain burdens imposed on one which do not rest upon another."

The gist of that decision is denial of power in a legislature to select a concern with a business consisting of service to a designated number of units, and prescribe regulations, consisting of limitation of charges, etc., thus imposing burdens not resting on those serving a lesser number.

In all the Kansas statutes noted there is no provision for, or opportunity given, to predetermine the execution of the respective laws, or rates or duties thereunder, except where matters are referred to the Railway Commissioners. In all cases where the prescription applies directly there is no available way to test its constitutionality until it is applied as effective. In the words of the supreme court of Kansas, "Such an investigation may be made in any proceeding in which a carrier may be called to account under the act." This is sufficient in all cases, with the exceptions we have noted heretofore.

It is unnecessary to comment upon all the cases cited by plaintiff in error. Many of these support our position, rather than the opposite, as may be seen by perusal. Thus Cook v. Marshall County, 196 U. S. 274, where the Iowa cigarette tax was upheld; Magoun v. Illinois Trust Co., 170 U. S. 283, where the Illincis inheritance tax was sustained, etc.

In nearly every law written on the statute book certain considerations of public policy demand a segregation of individuals from their fellows. This separation is rendered more complex with the advancement of mechanical and social arts. With each forward development, *sic utere ut alienum non laedas* acquires a new interpretation, and is applied to new relations, and in a different guise. In such applications the considerations operating on the legislative will are proper subjects for judicial inquiry, upon debate arising over questions of the validity of such enactment. Current history is invoked, the evil sought to be remedied, and knowledge of the arts and sciences laid under contribution.

Under the maxim above quoted, the police power controls and restrains every man in his acts and contracts. Counsel questions the reasonableness of the segregation of oil shippers and carriers from shippers and carriers of other products. It is seen how the legislature of Kansas have separated the cattle shipper from the sheep shipper, the shipper of grain from the shipper of groceries and other merchandise; the coal dealer from the dealer in wood. More obvious reasons than in the present case would be hard to imagine. In consideration of such a question arising in the construction of this act, judicial notice affords powerful aid.

"The true meaning is to be found not merely from the words of the act, but from the cause and necessity of its being made, from a comparison of its several parts, and from extraneous circumstances."

Hawkins v. Gathercole, 6 De G. M. & G., 1; 24 L. J., n. s., ch. 332.

Stradling v. Morgan, Plowd. 214.

Eyston v. Studd, *id.* 465.

Cincinnati, etc., Co. v. Avondale, 43 O. St. 257.

"The law is plain. To know how to interpret the resolution it is needful to recall the history of the matter. That this is a legitimate and necessary aid to construction, we quote: 'In construing an act of Con-

gress, the court may recur to the history of the times when it was passed, in order to ascertain the reason for, as well as the particular provisions.' (United States v. Union Pac. R. Co., 91 U. S. 72.)

"Look, if necessary, to the public history of the times in which it (the act) was passed. (Auldridge v. Williams, 44 U. S., 3 How. 24.)

" 'In the construction of the statutory or local laws of the state, it is frequently necessary to recur to the history and situation of the country, in order to ascertain the reason as well as the meaning of the provisions in them, to enable the courts to apply, with propriety, the different rules of construing statutes.' (Preston v. Browder, 1 Wheat. 121.)"

W. & A. R. Co. v. Georgia, (Ga.) 14 L. R. A. 438, 458.

"Such legislation must be viewed in the light of the fact that the industrial classes of the country are menaced, or supposed to be menaced, as never before, by gigantic interests, having for their object the suppression of competition, the control of prices, and the monopolization of markets; that this fact, more than any other topic, constitutes the theme of public alarm; that legislators in both state and national assemblies are earnestly besought by their constituents to devise measures to avert what, either rightfully or unduly, is conjectured to portend a direful subversion of our entire economic system, and that the enactments of the kind in question are the responses of the law-making bodies to the demands of the immediate time. These are the facts of the current period, known and read of all men, and discovering to the courts, as well as everybody else, the intent of the legislature."

State v. Smiley, 65 Kan. 240, 67 L. R. A. 903.

So it is declared notice will be taken of the history and conditions of the people, the history of the state, the doings of the people, as well as the public questions which have agitated their minds, and the court is familiar with the conditions of the people as any well-informed citizen. It knows of deposits of oil and gas, the enterprises of the people in a business way, the general facts concerning public aims and interests in social and economic ways.

Coleman v. Kelly, 71 Kan. 811, 70 L. R. A. 450.

Applying these rules, the court will take notice of sociology, and individual and social economy. The court will know that in the traffic of petroleum has grown up a method of commercial piracy hitherto undreamed of. They will notice the undenied, if not undeniable, impeachment of Standard Oil methods contained in Lloyd's "Wealth Against Commonwealth." They know that this monopoly obtained its supremacy and maintained its strangling hold through transportation favors. They will know that for many years no more prosperous business enterprises were conducted than in the oil regions of Pennsylvania, snuffed out by the poisonous blast of discrimination in freight rates, forced on the railways as claimed by their managers by the insidious monopoly. They know that since its effective organization, as soon as a field is proved and developed "Standard," through control of transportation rates, it fixes the price of crude oil to the producer, and in turn fixes the amount which the consumer of the refined products must pay, laying a blighting hand on every field of oil production; that it has levied its tribute, and arrogantly forced contribution from every household in the land; that its triumphant progress has left a wake of suicide, arson, bankruptcy, economic disaster; that enterprises in the fair state of Kansas, once flourishing and prosperous, are now stricken down by this gigantic and apparently uncontrollable power; that when all this is recounted, not a tithe of its baneful influence has been touched upon; that all this has been made possible only by the connivance and coöperation of common carriers. By rebating and other forms of discrimination in freight rates, this, the Archtype of Monopoly, the Pattern of all Trusts, the Medusa of our time, controls, blights, levies its tribute, only and solely because the common carriers have so long and universally disregarded the requirements, so old, so reasonable, so essential to general economic welfare, of equal service to all for a common charge. No such menace to general welfare existed in relation to the transport of grain, coal, stock,

or like staples, yet we find frequent segregation of these in their relation to railways, which are legislated for, and penalties for violation prescribed. But appellant in error insists that as to oil traffic there should be no restraining hand.

When a private business becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative control.

From the dissenting opinion of Bradley, J., in Sinking Fund Cases, 99 U. S. 700, 747; approved by the opinion of the court in Budd v. New York, 143 U. S. 517.

The legislature had before attempted to curb this power in other and more direct ways, which had proved ineffectual through impingement on constitutional privileges, and here, like Gilliatt in Hugo's story, has sought to strike the economic monster in its only vital point, its control of freight rates, which the legislative body could only do through its police power over the carriers; and here the legislature by this act directly fixed the rates on oil transport over land and water, to which the response of plaintiff in error is twofold, first, by reduction of rates below the statutory figure (who could it be?), second by attacking this legislation as unconstitutional.

By chapter 315, Laws of 1905, another blow is aimed, wherein the legislature directly fixed the rates on oil transport through pipes, compelling distribution to all; but the act last mentioned also provides that the State Board of Railroad Commissioners be empowered to change those rates to reasonable figures not more than those legislatively prescribed, trying to feel the way down to a lower level of prices of transmission, as it is known that transmission by pipes is far cheaper than by freight overland. This delegated power to the Board of Commissioners is made the subject of judicial supervision, but not the maximum rates fixed by the legislature for pipe-line transmission.

The penalties in the two acts, while similar, are not exactly coincident. Both are subject to enforcement in case of violation of the law, either as a public or private wrong, but chapter 353 is more restricted in operation than chapter 315. The former is divisible. For overcharge or refusal of transportation the remedy is strictly private—a suit for damages for loss incurred. For discrimination in charges it is made strictly public, denounced as a misdemeanor, with a fine of not less than $500 and forfeiture of charter.

In chapter 315 the remedies are double throughout. For discrimination as to service rendered, for overcharge, for discrimination in charges, and failure to obey any rule lawfully made by the Board of Railroad Commissioners or any of them, a private action is given any party injured for damages for the loss incurred $500, and in addition to any of these offenses, forfeiture of charter or permit to do business in the state, so that the enforcement of said provision rests not only with private parties, but the power of the state is invoked to visit the severest penalty the law can inflict—civil death—a fate which the common carrier courts only by commission of the most heinous of the derelictions denounced—discrimination in rates.

Drastic remedies these, involving the business life of the offender—but the occasion demanded extraordinary treatment. Mortal disease is illy combated with a placebo. Acute progressive maladies must be treated symptomatically, not sympathetically. Here is a disease in the body politic. The diagnosis was desperate, the prognosis unfavorable. Symptomatic indications were drastic dosage. Such the legislature prescribed.

For three decades this economic disease had been acute and progressive. Its cause had long been discovered. Its pathological conditions were fully understood. Even legal empiricism was preferable to repetition of measures so often proved futile. The cause must be stricken with a mortal blow. For many years a remedy had been generally prescribed, as applied

to railroads in general relations (Gen. Stat., Kan., 1901, secs. 5985, 5993, 5994), but the potencies had been placed too low. By the prescriptions of 1905 the potencies were increased and the dosage enlarged. All common carriers were rendered subject to the legislative control. Pipe lines had in other jurisdictions been held private and not common carriers. Here the common-law liability is recognized and penalties provided; not only for land, but for pipe lines as well. These penalties were wholly in the legislative discretion, except in case of impingement on the fundamental law.

It was not in view of the damage to the immediate parties alone that private damages were awarded. The bad practice must be stopped. This could be effectively done in one of two, or by a combination of two ways, one by the infliction of corporal or pecuniary punishment for the public wrong, the other by provisions for enhanced damages to the party directly injured. The latter was limited to $500 and attorneys' fees by both chapters. By chapter 315 corporal punishment—civil death—ran concurrently. By chapter 353, the civil remedy alone was provided for, as against overcharge and discrimination in service; but as to discrimination in charges the public wrong alone was punished—by pecuniary mulct as well as forfeiture. The land carriers, instead of complaining, ought to congratulate themselves that the rates so fixed can be changed only by legislative action, instead of having, as in the case of the pressure carrier, a delegation of power to the Railroad Commissioners to feel the way down to the lowest level of compensatory service, from the maximum rate legislatively prescribed.

Upon the proposition that the litigation is not on equal terms, suffice it to say that applications of the police power are seldom or never upon equal terms. *Melior conditio defendentis* applies only to the consideration of evidence, not to the matter of procedure. What is the police power? It is the restraining and

protecting arms of government wherever applied, in a broad sense. Its principles are applied in many instances unsuspected. It embraces the entire realm of the criminal law. It attends every application of its governing maxim, *sic utere tuo, ut alienum non laedas.* Every legal question of public health, safety, morals, convenience, and general welfare is within its purview.

"It is essential to the full accomplishment of the purposes of government. It is said that it extends . . . in short to all which promotes the public welfare." State v. Chittenden, (Wis.) 107 N. W. 500, 517. It "may be paraphrased as society's natural right of self-defense. . . . The police power of the state is the power to govern men and things in the limits of its dominion. It comprehends those laws or internal regulations necessary to secure peace, good order, health and happiness of the people. . . . It adapts itself to the changing conditions of society. . . . The liberty of the individual may always be restrained where its unregulated exercise becomes a source of danger or injury to the society of which that individual is a member." McGuire v. Chicago, B. & Q. R. Co., (Ia.) 108 N. W. 902, 906. "It aims to regulate the intercourse of citizen with citizen, to prescribe the measure of using one's property and pursuing one's occupation so as not to trespass on the rights of others. . . . Every new use to which the forces of nature is put calls for a new interference of this power." (Brewer, J.), K. P. R. Co. v. Mower, 16 Kan. 573. Hawthorne v. People, 109 Ill. 302, 50 Am. Rep. 610. "They are nothing more nor less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its dominions, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its do-

minion." (Taney, C. J.), License Cases, 5 How. 504, 583.

It extends beyond the administration of the criminal law, to public safety, public convenience, health and prosperity. Here it regulates common carriers and public bailees generally. It protects the helpless weak against the overbearing strong; limits the hours of labor in mines, Holden v. Hardy, (Utah) 37 L. R. A. 103; in laundries, Soon-hing v. Crowley, 113 U. S. 703; protects the money of the people in banks, Meadowcroft v. People, 163 Ill. 26; Youngblood v. Birmingham T. & S. Co., (Ala.) 20 L. R. A. 58; protects them against usurious contracts compelled by necessity, State v. Cary, 126 Wis. 135; Youngblood v. Birmingham, etc., Co., *supra;* compels prompt settlement of small claims, Seaboard Air Line Co. v. Seegers, 207 U. S. 72; changes rules of the common law and imputing negligence of fellow servant to master, 157 U. S. 209; protects minors, *Ex p.* Spencer, (Cal.) 86 Pac. 896; forbids all contracting power to some and restraining some contracts of all, Mumford v. Chicago, R. I. & P. R. Co., 128 Iowa, 685; pervades all public and restrains all private life their functions, aims and desires.

For the reasons set forth above, the classification here is not only reasonable, but is almost autosuggestive, in view of the economic history of the time, hence is unobjectionable. The act in every phase is within the legislative discretion, over which the courts assert no control, nor do they exercise supervision, except so far as constitutional rights may be violated, the application of which, with rare exceptions, is not and can not be made until a violator of the law is "called to account" for dereliction.

State v. Drayton, (Neb.) 117 N. W. 768, 770.

Seabold v. Northumberland Co., 187 Pa. St. 318.

State v. F. & M. Irr. Co., 59 Neb. 4.

Chicago, B. & Q. R. Co. v. Anderson, (Neb.) 101 N W. 1019.

Cameron v. Chicago, M. & St. P. R. Co., (Minn.) 31 L. R. A. 553.

Missouri Pac. R. Co. v. Merrill, 40 Kan. 404.

State v. Henley, (Tenn.) 39 L. R. A. 126

Matthews v. St. Louis & S. V. R. Co., (Mo.) 29 L. R. A. 161, and note.

Board v. State, 26 Kan. 47.

St. Louis I. M. & S. R. Co. v. Paul, 175 U. S. 404.

Missouri Pac. R. Co. v. Mackey, 127 U. S. 215.

Insurance Co. v. Daggs, 172 U. S. 557

H. & M. Mfg. Co. v. Worst, U. S. Sup. Ct. Rep. 114.

Knoxville v. Bird, 12 Lea 66, 47 Am. Rep., 326.

Louisville, S. V. & T. Co. v. Louisv. & N. R. Co., (Ky.) 14 L. R. A. 597.

State v. Burgdoerfer, (Mo.) 14 L. R. A. 846.

Louisiana v. Schlemmer, 42 La. Ann., ——; 10 L. R. A. 135.

Jensen v. Fricke, 133 Ill. 171.

Not only may there be segregation of a class of business pursuits, but there may be idividualization of branches of a particular pursuit.

Farmers' & M. Ins. Co. v. Dabney, 189 U. S. 301.

And the fact that a statute is admittedly oppressive does not warrant interference on constitutional grounds.

State v. Harrington, 68 Vt. 221; 34 L. R. A. 579.

In this connection may be instanced the extinction of state banks of issue by Congress in the passage of the ten-per-cent tax measure.

Nor does the fact that litigants are not on equal terms as to costs or attorneys' fees constitute a tenable ground of objection. In litigation growing out of the police power, the parties are seldom, if ever, on equal terms with respect to attorneys' fees and costs. In Kansas, and in most of the states, upon conviction a person convicted either of a misdemeanor or felony, is taxed with an attorney's fee and costs; upon acquittal, however, he can not recover either from the state; and generally the allowance of attorneys' fees in cases under the police power is well settled.

Railroad Company v. Ellis, 165 U. S. 150, was not argued for defendants in error, consequently was an *ex parte* decision. Of such it is said by ancient authority:

A decision "done without debate, or any argument or consideration had of it, makes the precedent of no force in point of law; judgments and awards given upon deliberation only, and debate, are proofs and arguments of weight."

Held by the Managers for the Commons (consisting of Sir Edward Coke, former Lord Chief Justice B. R., Sir Dudley Diggs, afterward Master of the Rolls, Sir Edward Littleton, afterward Attorney-general and Lord Keeper, and John Seldon, the most eminent legal writer and antiquarian authority of his day, assisted by Denzil Hollis, afterward Baron Isfield, and others); concurred in by the Law and Lay Lords unanimously.

Proceedings on the State of England, 3 Car. I, 3 How. St. Tr. 143.

The Ellis case is limited to the consideration of mere collections, and in no respect can be said to be applied to cases arising under the police power. In that view it harmonizes with other decisions; but losing sight of that principle, its views have been subject to many misconstructions.

Seaboard Air Line R. Co. v. Seegers, 207 U. S. 72, under substantially the same state of facts (except that attorneys' fees were not allowed), was held to be within the purview of the police power, and would almost seem to be an overruling of the Ellis case, which is there, while not criticized, distinguished and limited. In Gano v. Milwaukee & St. L. R. Co., 144 Iowa, 719, Mr. Justice Deemer sums up the situation in a masterly manner, holding the Ellis case of no authority against the allowance of attorneys' fees in cases under the police power. The Gano case was affirmed per curiam on error, 190 U. S. 557. In the following, among other

cases, the allowance of attorneys' fees in such cases has been upheld:

Kansas P. R. Co. v. Mower (by Brewer, J.), 16 Kan. 537.

S. K. R. Co. v. Rice, 38 id. 398.

Titus v. Corkins, 21 id. 722.

Atchison, etc., Co. v. Matthews, 58 id. 447; affirmed 174 U. S. 96.

Assurance Co. v. Bradford, 60 id. 82.

St. Louis, etc., R. Co. v. Snavely, 47 Kan. 637.

Missouri P. R. Co. v. Henning, 48 id. 465.

State v. Fritz, (Kan.) 101 Pac. 1013.

State v. Plamondon, 75 Kan. 269.

In re Ellis, 76 id. 368.

Burlington, etc., Co. v. Dey, (Ia.) 12 L. R. A. 436.

Dow v. Biedleman, 49 Ark. 455, affirmed 125 U. S. —.

Singer Mfg. Co. v. Fleming, (Neb.) 23 L. R. A. 210.

Vogel v. Pekoc, 157 Ill. 339.

Dell v. Marvin, (Fla.) 45 L. R. A. 553.

Union, etc., Co. v. Chrowning, 86 Tex. 654.

Taylor v. Chi. M. & St. P. R. Co., 83 Wis. 645.

Hartford F. I. Co. v. Redding, (Fla.) 67 L. R. A. 518.

This court have heretofore limited the Ellis case as governing to those cases strictly arising without the purview of the police power.

Fidelity M. L. I. Co. v. Mettler, 185 U. S. 308.

Iowa L. I. Co. v. Lewis, 187 U. S. 33.

Farmers and Merchants' Ins. Co. v. Dabney, 189 U. S. 301.

As plaintiff in error complains of inordinate penalties, it may be well briefly to examine the act in that respect, remembering that a mere excessive penalty is not of itself sufficient cause for holding the act unconstitutional.

State v. Harrington, 68 Vt. 221; 34 L. R. A. 579.

The present case is not brought for a penalty, but is simply for the damages sustained by defendant in error caused by the wanton negligence of plaintiff in

error, and the oppression practiced upon defendant in error, for which punitive damages might be recovered, which recovery the legislature has limited to $500 and attorneys' fees. The enhanced damages so fixed is a personal matter merely, and in which the state is given no direct concern. It is within the legislative discretion, in all applications of the police power, to give enhanced damages to a party injured, and the amount is wholly within the province of the legislative department. There may be double damages, double costs, allowance of attorneys' fees, or other measure of damages, fixed at a determinate amount (as here), or there may be added to the actual damages an attorneys' fees; or on the other hand, there may be enhanced damages, termed punitive, exemplary, or vindictive damages, or smart money, indeterminate in amount, to be fixed as the jury in their discretion, restrained only by the doctrine that passion or prejudice shall not enter into the equation; or there may be, either alone, or in connection with other enhanced damages, an attorneys' fee, indeterminate in amount, to be fixed by the court or jury, restrained only by the requirement that such fees be reasonable.

Missouri Pacific R. Co. v. Humes, 115 U. S. 512.

In Atchison, etc., Co. v. Sample, Mr. Justice Brewer clearly points out the distinction between a penalty for a public wrong, and enhanced damages to a private individual who has suffered injury. He says (the italics are his):

"The legislature may give *damages* wherever *loss* has been sustained. It may even give enhanced damages, double damages, treble damages, exemplary damages, and remote as well as proximate damages, but these are all *damages* because of *loss* sustained and not merely punishment for some breach of the penal laws. . . . The legislature may also give costs, such as officers' fees, witness fees, attorneys' fees, etc., but these are also given as compensation for loss. The legislature may also give interest, or enhanced damages in the nature of interest, but this is also done on the principle of giving compensation for loss."

As to the question of forfeiture of charter, that feature is not involved; but as discrimination in rates is a most effectual means of killing off a business (Standard Oil Co. v. United States, *loc. cit.* 379) it would seem that forfeiture of charter would be the only measure of punishment really fitting the crime (in a business sense) of discrimination in charges, for that is a means of committing, so to speak, deliberate murder of a business. This portion of the statute might be held void without affecting the other portions; as discrimination is prohibited under heavy penalties under ch. 84, Gen. Stats. (Kan.) 1901, it can still be punished.

This court, in the case of Seaboard Air Line Company v. Seegers, *supra*, judicially noticed the fact that overcharges are usually in such small amounts that for the loss actually incurred the loser has no incentive or encouragement to litigate concerning it, for he can not afford to do so (and in every new application it usually means following the case through the state supreme court, and often for trivial amounts even to this bar), yet the fact that it is to the public interest to enforce proper performance of the public duty undertaken by the carrier, the penalty is upheld, though out of proportion to the amount originally involved.

The agent of the Missouri Pacific Railway Company, in the present case, acting in the line of his duties, thereby binding his principal (12 Am. & E. Ency. of L., 2d ed., 41) acted wantonly and oppressively, or with gross negligence, as you please (rec. 81, 82), which of itself would warrant the assessment of punitive damages; and in questions under statutory actions, allowance of enhanced damages with or without attorneys' fees, the legislative discretion is not reviewable, whether termed "damages" or "penalty." The purpose is prevention as well as punishment.

Southern K. R. Co. v. Rice, 38 Kan. 398.

Cady v. Case, 45 id. 733.

Kansas City, etc., Co. v. Little, (Kan.) 61 L. R. A. 122.

Wiley v. Keokuk, 6 Kan. 94.
Kifley v. Baker, 19 id. 9.
Kansas P. R. Co. v. Kessler, 18 Kan. 523.
Jockers v. Borgman, 29 id. 109.
Wheeler & W. Co. v. Royce, 36 id. 350.
West v. W. C. T. U. Co., 39 id. 93.
Atchison, etc., Co. v. Hervey, 55 Kan. 715.
Minneapolis & St. L. Co. v. Beckwith, 129 U. S. 26.
Voltz v. Blackmire, 64 N. Y. 440.
Phillippis v. Lawrence, 6 W. & S. 150.
Haines v. Schultz, 50 N. J. L. 481.
Mugler v. Kansas, 123 U. S. 623.
Humes v. Missouri Pac. R. Co., *supra.*
State v. I. & I. S. R. Co., (Ind.) 18 L. R. A. 502.
Seabord Air Line R. Co. v. Seegers, *ubi supra*
Western U. T. Co. v. Reynolds, 100 Va. 459.
Same v. James, 162 U. S. 680 (on a statute identical with the Reynolds case).
St. Louis, etc., Co. v. Gill, 54 Ark. 101; affirmed 154 U. S. 649.
Kansas P. R. Co. v. Mower, *ubi supra.*
Dow v. Biedleman, *ubi supra.*
Peoria, etc., Co. v. Duggan, 109 Ill. 537.
Union, etc., Co. v. Chowning, *ubi supra.*
Burlington, etc., Co. v. Dey, 82 Iowa, 312.

No change of rates having been shown, and as it furthermore appears that shipments have been made habitually by plaintiff in error at twenty per cent below the statutory rate (cf. rec. 104, 127), there can be no complaint of unreasonableness of the schedule. As it appears that shipments have been made at twenty-five per cent below the statutory rate, of what value is the showing of the aggregate amount of oil shipments, unless the statements should show (which they fail to do) the actual rates charged? How is it to be known but what the bulk of the shipments were made twenty-five per cent below the statutory rate, and that instead of $876.03 oil freight receipts, had the full statutory rate been charged in each instance the receipts for oil shipments might be $12,000 and upwards?

What then would have been the ton mile receipts for oil? Neither in the record nor in the brief of plaintiff in error is there suggestion of answer to this peculiarly pertinent inquiry.

In view of the record in this case, in connection with the principle that in order to adjudge a statute unconstitutional it must so appear beyond reasonable doubt, which this record wholly fails to show, defendant in error respectfully urges that the decision of the supreme court of the state of Kansas should be affirmed. Respectfully submitted.

JOHN S. DAWSON,
Attorney-general of Kansas,

S. N. HAWKES,
Asst. Attorney-gen. of Kansas,
Attorneys for Defendant in Error.

RICHARD HENRY TOWNE,
JOHN W. TUCKER, *pro se*,
Of Counsel.

MISSOURI PACIFIC RAILWAY COMPANY *v.* TUCKER.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 52. Submitted November 14, 1912.—Decided June 16, 1913.

To require a railroad company to charge such rates for transportation as prevent it from obtaining a reasonable return for the service rendered amounts to deprivation of property without due process of law in violation of the Fourteenth Amendment and is beyond the power of the State. *Atlantic Coast Line* v. *North Carolina Commission*, 206 U. S. 1.

Rates that a railroad company may charge for transportation as fixed by the legislation of a State are presumptively valid, but not conclusively so; and the company is entitled to have the question of whether the prescribed rates are confiscatory and therefore deprive it of its property without due process of law determined in appropriate judicial proceedings.

A common carrier is not at liberty to accept or decline shipments of lawful merchandise but must accept them and name to the shipper the rate of transportation.

While it may be within the power of the State to impose double or treble damages on a carrier for overcharging transportation rates, it is beyond its power to impose a fixed amount as liquidated damages in every case regardless of, and as a general rule many times in excess of, the actual damages. To do so would deprive the carrier of its property without due process of law in violation of the Fourteenth Amendment.

A state statute which does not permit a carrier to have the question of sufficiency of rates determined by a court of competent jurisdiction, and which imposes such conditions upon the appeal for judicial relief as works an abandonment of the right rather than face those conditions, is unconstitutional as depriving the carrier of its property without due process of law. *Ex parte Young*, 209 U. S. 123, 147.

That part of the statute of Kansas of 1905 establishing maximum rates for transportation of oil, gasoline, etc., which fixes $500 as liquidated damages in favor of the shipper for any excess charge regardless of the amount thereof, is so arbitrary and oppressive as to render it

unconstitutional under the Fourteenth Amendment as taking the property of the carriers without due process of law.
82 Kansas, 222, reversed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of the statute of 1905 of the State of Kansas establishing maximum rates for transportation of oil, gasoline, etc., which fixes five hundred dollars as liquidated damages for violations of the act, are stated in the opinion.

Mr. Bailie P. Waggener for plaintiff in error:

The act is, on its face, in conflict with the Constitution of the United States, and denies the railway companies the equal protection of the law.

When the railroad company is called to account for a violation of the law, it may then, and not until then, question the rates. The Supreme Court of Kansas has so construed the statute. *C., M. & St. P. R. R. Co.* v. *Minnesota*, 134 U. S. 418, 458.

Violation of this section of the act is not made a misdemeanor, and no public officer is charged with its enforcement. The unreasonableness of the rates, therefore, cannot be tested or questioned in a comprehensive bill in equity. The company can initiate no affirmative action.

The judgment in one case would not be *res judicata* as against any other shipper seeking to collect the penalty. The statute is void on its face under *Ex parte Young*, 209 U. S. 123, 146.

The statute of Kansas involved in this case is far more drastic, arbitrary and unreasonable than the statute of Nebraska, declared unconstitutional in *Mo. Pac. Ry.* v. *Nebraska*, 217 U. S. 207, and see also *C., M. & St. P. Ry. Co.* v. *Minnesota*, 134 U. S. 460.

While the railway company is testing the validity of the law as to one shipment, either the confiscatory rates are in force or enormous penalties are accruing against

the carrier for non-observance of the statutory schedules. The remedy afforded must be adequate, or it is not due process of law. *Smyth* v. *Ames*, 169 U. S. 466, and see also *Davidson* v. *New Orleans*, 96 U. S. 102.

The construction placed upon the act by the Supreme Court of Kansas in effect closes all approach to the courts by the carrier for relief from unreasonable and confiscatory legislative rates. To provide a remedy which is unreasonable, and which is so onerous and impracticable as to substantially give none at all, renders the law invalid, although what is termed a remedy is in fact given. *McGahey* v. *Virginia*, 135 U. S. 662, 694; *Ex parte Young*, *supra*.

The act is class legislation of the rankest character, arbitrary and unreasonable, and denies to railroad companies the equal protection of the law.

The rates prescribed by the schedule in the act are unreasonable and confiscatory, and deprive the railroad company of its property without compensation, and without due process of law, and deny to it the equal protection of the law.

Mr. John S. Dawson, Attorney General of Kansas, *Mr. S. N. Hawkes*, *Mr. Richard Henry Towne* and *Mr. John W. Tucker*, *pro se*, for defendant in error:

No violation of the due process clause of the Fourteenth Amendment is shown in the statute involved in this case.

There being no showing of any reduction in rates of oil transported, there can be no violation by the legislation of the due process clause of the Fourteenth Amendment. Because an article may be carried at a loss the rate is not necessarily unreasonable.

Under the rule of commercial necessity, certain commodities are at times transported at a figure below the average of tariffs, sometimes at an actual habitual loss. The fact that such rate may be prescribed as to a particu-

lar commodity will not from that fact alone lay the prescription open to the imputation of unreasonableness. *State* v. *Minn. & St. L. R. Co.*, 80 Minnesota, 191; *S. C.*, aff'd 186 U. S. 257; *State* v. *Railroad Co.*, 57 So. Rep. 673; *Reagan* v. *Farmers' L. & Tr. Co.*, 154 U. S. 362, 412.

In so flagrant a case of discrimination as here shown, public interest, public policy, and public welfare demand adequate means for fixing rates at least as low as those habitually given the most favored shipper, and especially is this applicable to an integral product, the theme of such notorious comment and animadversion as the oil traffic. *Ala. & V. R. Co.* v. *Mississippi R. R. Com.*, 203 U. S. 496; *Seaboard Air Line Co.* v. *Florida*, 203 U. S. 261.

Public interest and even custom, under the guise of "commercial necessity," may outweigh the usual considerations entering into the fixing of a rate. Carriage at habitual loss is of so common occurrence that the courts take judicial notice of the usual course of business in that regard, and will refuse to condemn as unreasonable a prescription of that nature, when falling within the rule of necessity or demanded by public interest. *McCue* v. *Nor. Pac. R. Co.*, 25 L. R. A. (N. S.) 1001; *S. C.*, aff'd, 216 U. S. 579; see also cases compelling a road to put on additional trains at a positive loss, whether it be for public safety, or mere personal convenience. *Atlantic Coast Line* v. *North Car. Com.*, 206 U. S. 1; *Mo. Pac. Ry. Co.* v. *Kansas*, 216 U. S. 262. And as to other requirements, *Consumers' Co.* v. *Hatch*, 224 U. S. 148; *Memphis* v. *Postal Tel Co.*, 164 Fed. Rep. 342.

Legislation fixing rates of transportation is presumptively reasonable, and the burden is on plaintiff in error to show that the rate is unreasonable from every angle. *Texas & P. R. Co.* v. *R. R. Com.*, 192 Fed. Rep. 280; *Railroad Commission* v. *Cumberland Tel. Co.*, 212 U. S. 414, see, also, *So. Pac. Cov. R. R. Com.*, 193 Fed. Rep. 699.

If the statute be doubtful, the court will presume that

the legislature intended the enactment of a valid, sensible and just law, Black on Interpretation, 87, and that the legislature did not attempt to transcend the rightful limits of its authority. *Id.* 89. Every act is presumed to be valid and constitutional until the contrary is shown. *Id.* 93, and cases there cited; see also *Sinking Fund Cases*, 99 U. S. 700; 1 Willoughby on Constitutional Law, 20, 23.

Charges must be reasonable, is the requirement of the law, as expressed by the cases. As to the question of reasonableness, the test is not alone if it be compensatory to this or that particular individual. *Reagan* v. *Farmers' Co.*, 154 U. S. 362, 412.

Reasonableness should be determined from average normal conditions. *C. & G. T. R. Co.* v. *Wellman*, 143 U. S. 680; *Covington & L. T. Co.* v. *Sandford*, 164 U. S. 578; *Dow* v. *Biedleman* (Ark.), 5 S. W. Rep. 297; *S. C.*, aff'd, 125 U. S. 680; *St. L. & S. F. R. Co.* v. *Gill*, 54 Arkansas, 101; *S. C.*, aff'd, 154 U. S. 649; *Purdy* v. *Erie R. Co.* (N. Y.), 48 L. R. A. 669.

The legislature is given, under the police power, not only the clear right to fix rates, in which it necessarily is given wide discretion, but when the legislature shall directly fix the rate, the rule that the question of reasonableness is a judicial one does not apply, but the rate fixed must be reasonable. Judicial determination does not precede the execution of the law, but on attempted enforcement it may be invoked in a proper case. *Budd* v. *New York*, 143 U. S. 517, and note 5 L. R. A. 559; *Munn* v. *Illinois*, 94 U. S. 113.

The State is simply farming out the operation of public utilities. See *Smyth* v. *Ames*, 169 U. S. 466, 544, holding that a railroad corporation maintaining a highway under the authority of the State may not fix its rates with a view solely to its own interests, and ignore the rights of the public.

This exercise of legislative discretion is subject to judicial supervision to no greater extent than is like exercise in any applications of the police power; the occasion for judicial determination does not arise until the law is applied as effectual.

This is an action for damages expressly given by the statute, not a penalty. If it were for a penalty, the only remedy therefor at common law would be an action in debt on the statute. This action would be trespass on the case at common law. This action sounds in tort. *Smith* v. *Chicago & N. W. Ry. Co.*, 49 Wisconsin, 443; *Heiserman* v. *Burlington Ry. Co.*, 63 Iowa, 736; *Graham* v. *Railway Co.*, 53 Wisconsin, 473.

It is not necessary that the statute to be constitutional must be weighted with a clog to its enforcement so as to give to the party affected an opportunity to obtain a judicial annulment of the legislation, not only as to himself, but as to every other person similarly affected.

That would mean that every penalty imposed, whether corporal or pecuniary, on behalf of the public, and as well every remedy given private parties damaged through infractions of the law, must be subject to some means of judicial investigation of the reasonableness of the requirement, in depriving the malefactor of property, or the tortfeasor in private injuries, if the one or the other shall be conducting business charged with public use or interest.

If that be the law, there is no legislative discretion in the case of business charged with public use and interest.

It is the province of the legislature to provide what the law shall be, and the duty of the court to determine and declare what the law is with reference to a given state of facts. McGehee on Due Process of Law, 77; *Roller* v. *Holly*, 176 U. S. 398; *Ex parte Young*, can be clearly distinguished from this case.

The act is not class legislation.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

By an act of February 17, 1905, the legislature of the State of Kansas prescribed a schedule of maximum rates to be charged by common carriers for the transportation, between points in that State, of "illuminating oil, gasoline, fuel oil, or crude petroleum, in cans, barrels, tanks or tank cars," and provided that every such carrier "which shall demand, exact or receive for such transportation or delivery any sum in excess of the rates hereby made lawful, shall be liable to any person injured thereby in the sum of five hundred dollars as liquidated damages, to be recovered by action in any court of competent jurisdiction, together with a reasonable attorney's fee, to be fixed by the court." Laws, 1905, c. 353, p. 589.

In December, 1906, there were shipped from Humboldt, Kansas, to Cawker City, in that State, 25 barrels of fuel oil, of which J. W. Tucker was the consignee. The shipment was carried from the point of origin about 253 miles over the railroad of the Santa Fe Company to Concordia, and thence to the point of destination, about 47 miles, over the line of the Missouri Pacific Railway Company. According to the statute the charge for the entire transportation should have been $12.00, but the Missouri Pacific Company demanded and collected therefor from Tucker, the consignee, $3.02 in excess of that sum. He thereupon brought an action in one of the courts of the State, under the act before named, to recover from that company $500 as liquidated damages and a reasonable attorney's fee, to be fixed by the court. The company defended upon the grounds that the statutory rates were confiscatory and void, and that the statute, and particularly the provision for the recovery of $500 as liquidated damages, was so arbitrary and unreasonable as to be repugnant to the due process of law and equal protection

clauses of the Fourteenth Amendment to the Constitution of the United States. Other defenses, based on the state constitution, were interposed, but we need not notice them. The plaintiff recovered a judgment for the $500, which was affirmed by the Supreme Court of the State, the Federal questions being decided adversely to the company, 82 Kansas, 222, and the latter prosecutes this writ of error.

As the right of recovery and the judgment sustaining it were rested upon the provision imposing a liability for liquidated damages in the sum of $500, we come at once to the question of the validity of that provision under the Fourteenth Amendment.

Primarily it is to be observed that the rates prescribed by the legislature, while presumptively valid, are not conclusively so; that to require the company, in the operation of its road, to give effect to rates which prevent it from obtaining a reasonable return for the service rendered to the public is to deprive it of its property without due process of law; and that whether the prescribed rates are thus in excess of the State's power (see *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 24–26, and cases cited) is a question which the company is entitled to have determined in appropriate judicial proceedings. And it also is to be observed that the act of 1905 and other laws of the State, as construed by the state court, afford the company no opportunity for securing a judicial determination of the validity of these rates otherwise than as it may do so in a defensive way when charged, in a case like this or in some criminal prosecution, with failing to give effect to them.

Being a common carrier, the company is not at liberty to accept or decline shipments of oil. It must receive and carry them when offered and must be ready to name to shippers the rates at which that service will be rendered. If the statutory rates permit a reasonable return they are

controlling; if they prevent it they are invalid. But of their obligatory character the company is not the judge. And yet it must choose whether it will give effect to them or no, and then must abide the result of its action. If they be so unreasonably low as to be invalid it cannot give effect to them without sustaining a serious and irreparable loss; and if effect be not given to them and they be subsequently adjudged lawful, the enforcement of the prescribed liabilities and penalties will likewise entail a most serious loss, for the transactions involved must necessarily be numerous. In one of the briefs it is said that the intrastate oil shipments on the company's lines in Kansas in a single year are as many as 10,000. Thus it will be perceived that the position of the company, with no right itself to institute a proceeding to determine for itself and all shippers the validity of the legislative rates, is one of exceeding perplexity.

On the other hand, the interests of shippers and consumers of oil must be considered no less than those of the carrier. Experience teaches that to secure adherence to rates, even when lawfully prescribed, it is essential that deviations from them be discouraged by adequate liabilities and penalties.

It is in the light of these considerations that the validity of the provision imposing a liability for liquidated damages in the sum of $500 for every charge in excess of the legislative rates must be tested.

It will be perceived that this liability is not proportioned to the actual damages. It is not as if double or treble damages were allowed, as often is done, and as we think properly could have been done here. Nor is it as if there would be difficulty in proving or ascertaining the actual damages, thereby furnishing a reason for prescribing a liquidated amount reasonably approximating the probable damages, taking one case with another. *Chicago, Burlington & Quincy Railroad Co.* v. *Cram*, 228 U. S. 70. What the

statute does is to authorize a recovery of $500 in every case, whether the shipment be of one barrel, or of ten or twenty-five barrels, or of a tank car, and this although it is of common knowledge that the possible damages in respect of the charge for carrying any of these from one point in the State to another could never be more than a small fraction of that sum. In the present case the shipment was of 25 barrels for a distance of 300 miles, and the excess over the legislative rate, $3.02, was less than 1–150 of the authorized recovery.

The state court, although recognizing that the solution of the problem is not free from difficulty, reached the conclusion that "so long as the defendant [the carrier] cannot be made to suffer until a competent court has passed upon the justice of the legislative rates, the guarantees of the Federal Constitution are not infringed." But that this view fails to recognize the real plight of the carrier is made plain by the following extract from the opinion in *Ex parte Young*, 209 U. S. 123, 147:

"If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

"It is urged that there is no principle upon which to

base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested, the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event."

What was said in that case is conclusive of the question here. True, the act then under consideration subjected the officers and agents of the carrier to penalties not found in the act now before us, but, notwithstanding this, we think the liabilities and penalties imposed by the Kansas statute bring it within the controlling principle of that

decision. As applied to cases like the present the imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages but is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law and therefore in contravention of the Fourteenth Amendment. See *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 111; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 286.

Upon this ground the judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.